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# Nationality and Internationality in International Humanitarian Law

BARTRAM S. BROWN\*

## I. INTRODUCTION

The mission of the International Criminal Tribunal for the former Yugoslavia (ICTY) is to apply a well-established body of international humanitarian law as criminal law.<sup>1</sup> First, however, that law must be adapted to this use. International humanitarian law originated in the nineteenth century, a time when a “state-centric”<sup>2</sup> concept of international law prevailed. In that era, the law of nations<sup>3</sup> defined rights and duties for states but not for individuals, and so the law of armed conflict, as it first emerged, did not formally recognize the rights of individuals or directly provide for individual criminal responsibility.

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<sup>1</sup> The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia is generally referred to by its shorter name, the International Criminal Tribunal for the former Yugoslavia (ICTY). The four general categories of crimes within the jurisdiction of the Tribunal are: (1) grave breaches of the Geneva Conventions of 1949; (2) violations of the laws and customs of war; (3) genocide; and (4) crimes against humanity. See Statute of the International Tribunal, *Report of the Secretary-General Pursuant to Paragraph 2 of U.N. Security Council Resolution 808*, U.N. GAOR, 48th Sess., 3175th mtg., arts. 2–5, U.N. Doc. S/2-5704 (1993), reprinted in 32 I.L.M. 1159, 1192–93 (1993) [hereinafter ICTY Statute]. Each of these categories will be discussed in greater detail below.

<sup>2</sup> See Bartram S. Brown, *The Protection of Human Rights in Disintegrating States: A New Challenge*, 68 CHI.-KENT L. REV. 203, 205 (1992) (discussing the “state-centric” nature of international law).

<sup>3</sup> Mark Janis argues that “the law of nations of the seventeenth and eighteenth centuries [was] a law common to individuals as well as to states,” which developed into an international law of narrower scope in the era of nineteenth century positivism. Janis notes that in 1789, when Jeremy Bentham invented the expression “international law” in his *Introduction to the Principles of Morals and Legislation*, he offered the term as a replacement for the older term “law of nations” and that Bentham incorrectly assumed that, under either name, the scope of that law was limited to the relations between states. This contributed to the narrow scope of international law that prevailed in the nineteenth century. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 228–34 (1993).

An international humanitarian law defining and regulating individual criminal responsibility differs substantially from one which merely defines the legal obligations of states *inter se*. In order to fulfill its mandate, the ICTY must bridge this conceptual gap through a functional adaptation of the existing norms of international humanitarian law. As part of the fair trial process, the ICTY must define and apply the essential elements of crimes under that law. But this task cannot be completed in a vacuum. The ICTY must consider both the purposes of international humanitarian law and the realities of armed conflict in the world.

The essential purpose of international humanitarian law is to protect individuals in time of war.<sup>4</sup> To do so effectively, it should apply to crimes occurring within the broadest possible range of international and internal armed conflicts. The U.N. Security Council created the ICTY to prosecute serious violations of that law committed in the former Yugoslavia. Now that the first full trial before that institution has been completed, some critical deficiencies have become apparent. The state-centric bias of the current conception of international humanitarian law is revealed by its limited applicability to situations which may be said to lack "*internationality*"<sup>5</sup> because they do not involve direct conflict between two different states. When one attempts to apply international humanitarian law to atrocities committed by members of one ethnic group against members of another group who technically share the same *nationality*, the situation becomes especially confused. Recent conflicts in Bosnia and Herzegovina and in Rwanda are cases in point. The ICTY should strive to preserve the fundamental humanitarian protections of the existing law and the applicability of the international enforcement regime now in place. It can do so without compromising the fair trial rights of those accused by avoiding too formalistic an application of that law to contemporary situations.<sup>6</sup>

<sup>4</sup> "It is the object of international humanitarian law to regulate hostilities in order to attenuate their hardships. Humanitarian law is that considerable portion of international law which is inspired by a feeling for humanity and is centered on the protection of the individual in time of war." JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 1 (1985).

<sup>5</sup> The term "internationality" refers to "the quality or state of being international." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE: UNABRIDGED 1181 (1961). In the context of this Article it is used to refer to situations of armed conflict involving two or more states. Violations of international humanitarian law can qualify as grave breaches of the Geneva Conventions of 1949 only if committed in the context of armed conflicts with internationality. Parts III and V of this Article, *infra*, discuss this issue in greater detail.

<sup>6</sup> The issue of formalism in international humanitarian law is not a new one. The commentary to Article 29 of Geneva Convention (IV) points out that when that Convention was negotiated,

[t]he decision to limit the responsibility of the State to its agents was the subject of criticism at the Diplomatic Conference. Various delegations pointed out that an Occupying Power might have certain of its decisions carried out by the local authorities, or it might set up a puppet government, in order to throw responsibility for crimes, of which it was the instigator, upon authorities which were regarded as being independent of it. *In order to remove this difficulty, it is necessary to disregard all formal criteria.* It does not matter whether the person guilty of treatment contrary to the Convention is an agent of the Occupying Power or in the service of the occupied State; what is

The ICTY's decision in the case of Dusko Tadic marks the first time since the 1940s that an individual has been tried and convicted by an international tribunal for war crimes and other serious violations of international humanitarian law.<sup>7</sup> Tadic was charged with murder, torture, and other acts of persecution against civilians which, according to the indictment, constituted grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war, and crimes against humanity.<sup>8</sup> While the trial itself lasted more than seven months, it took several more months for the judges to complete their written decision.<sup>9</sup> This delay reflected the complicated legal and factual issues confronting the Tribunal, many of which were issues of first impression for an international court. Afterwards, even Tadic's lead defense attorney agreed that the trial had generally been a fair one.<sup>10</sup>

The written decision is a lengthy and complex document that identifies the essential elements of the crimes with which Tadic was charged.<sup>11</sup> But the three-judge Trial Chamber itself could not agree on how to apply some of these elements. The judges agreed unanimously on the factual issues concerning Tadic's criminal conduct, both in finding the evidence insufficient to support the murder charges and in finding him responsible for torture, ethnic cleansing, and other forms of persecution. They also agreed that his acts fell within the legal definition of both crimes against humanity and violations of the laws and customs of war, two different categories of crimes within the jurisdiction of the ICTY. The judges disagreed, however, on the issue of whether these same acts could also be legally characterized as "grave breaches of the Geneva Conventions of 1949."<sup>12</sup> This particular determination is especially significant because grave breaches, unlike most other categories of crimes within

important is to know where the decision leading to the unlawful act was made, where the intention was formed and the order given.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 29, 75 U.N.T.S. 287 (emphasis added) [hereinafter Geneva Convention (IV)].

<sup>7</sup> See *Prosecutor v. Tadic*, Case No. IT-94-I-T, Opinion and Judgment, para. 1 (T.Ch.II May 7, 1997). Legal documents related to the *Tadic* case and other ICTY cases cited in this Article (including indictments, motions, and judgments) are available on the ICTY's website at <<http://www.un.org/icty/cases.htm>> (visited Apr. 30, 1998).

<sup>8</sup> See *id.* para. 9.

<sup>9</sup> Closing arguments were heard from November 25–28, 1996. The final decision of the court was filed on May 7, 1997, five months later. See *id.* para. 34.

<sup>10</sup> Michail Wladimiroff, who acted as the lead defense attorney for Tadic during the course of the trial, has spoken favorably of the Tribunal's judges and their dedication to due process. He noted that while the parties operated "under severe restrictions, including no access to relevant documents and persons . . . within those limits the judges did a very good job, and were totally fair." Roy Gutman, *Confusion in War Crimes Case*, NEWSDAY, May 13, 1997, at A16.

<sup>11</sup> The official version of the Trial Chamber's decision is 301 pages long, with a dissenting opinion of 19 pages. See *Prosecutor v. Tadic*, Case No. IT-94-I-T, Opinion and Judgment, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute (T.Ch.II May 7, 1997).

<sup>12</sup> *Id.* paras. 738, 742, 760.

the jurisdiction of the international tribunal, are subject to a multilateral enforcement regime.<sup>13</sup>

The two-judge majority acquitted Tadic on all counts charging grave breaches. Under the terms of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War,<sup>14</sup> grave breaches can only occur against civilian victims<sup>15</sup> when two essential jurisdictional conditions have been met. First, the acts alleged to be grave breaches must have occurred in the context of an *international* armed conflict.<sup>16</sup> Second, to qualify as "protected persons" under that Convention, the victim or victims must suffer at the hands of a party to the conflict with whom they do not share the same *nationality*.<sup>17</sup> The majority concluded that Tadic's crimes did not constitute grave breaches because his victims, Bosnian Muslims and Bosnian Croats in the hands of Bosnian Serbs, were not "protected persons." They also tacitly found that his acts had not been committed in the context of international armed conflict because the Federal Republic of Yugoslavia (FRY) had formally withdrawn from Bosnia and Herzegovina several weeks before Tadic began to commit them.<sup>18</sup> The third trial judge dissented on this issue, concluding that the grave breaches provisions were applicable. In her view, the Trial Chamber's unanimous conclusion that the FRY continued to support the Bosnian Serb army was sufficient to establish both that the armed conflict was international, and that the victims of the accused were "protected persons."

The Trial Chamber's majority erred by not applying the grave breaches provisions of the Geneva Convention (IV) to violence against civilians in Bosnia and Herzegovina. It erred first in ruling that the armed conflict within Bosnia and Herzegovina was immediately

<sup>13</sup> Genocide is the one other crime subject to such a regime of enforcement under international humanitarian law, but the burden of proving genocide is much greater. See *infra* notes 199–213 and accompanying text.

<sup>14</sup> See generally Geneva Convention (IV), *supra* note 6.

<sup>15</sup> Alternative definitions of protected persons apply under the other three Geneva Conventions of 1949. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 4–5, 75 U.N.T.S. 31 [hereinafter Geneva Convention (I)]; Geneva Convention for the Amelioration of the Condition of Wounded Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, arts. 6, 7, 10, 75 U.N.T.S. 85 [hereinafter Geneva Convention (II)]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 4–5, 75 U.N.T.S. 135 [hereinafter Geneva Convention (III)].

<sup>16</sup> See Geneva Convention (IV), *supra* note 6, art. 2 (limiting the applicability of the Convention to armed conflict between parties to the Convention).

<sup>17</sup> See *id.* art. 4 ("Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."), art. 147 (defining grave breaches as certain enumerated acts committed against "protected persons" as provided in Article 4).

<sup>18</sup> As the dissenting opinion notes, "the majority makes no clear finding regarding the nature of the armed conflict after 19 May 1992." Prosecutor v. Tadic, Case No. IT-94-I-T, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, para. 5 (T.Ch.II May 7, 1997) [hereinafter Dissenting Opinion of Judge McDonald]. Instead, the majority decision on the applicability of Article 2 of the Statute turns on the related issue of whether the victims can be classified as protected persons. See Prosecutor v. Tadic, Case No. IT-94-I-T, Opinion and Judgment, para. 1 (T.Ch.II May 7, 1997).

transformed from an international armed conflict to an internal one<sup>19</sup> on May 19, 1992, when the Yugoslav National Army (JNA) formally announced that it had withdrawn. It erred in ruling that the Bosnian Serb political and military entities created by FRY (Serbia and Montenegro) when it “withdrew” from Bosnia and Herzegovina, shared a common nationality with the Bosnian Muslim and Bosnian Croat victims whom they persecuted in pursuit of an ethnically pure Serb state. Finally, the majority erred in applying the difficult “command and control” test in deciding whether the Bosnian Serbs acted as agents of the FRY with regard to the events charged in the indictment.

The majority opinion reflected a poorly conceived notion of nationality. International law recognizes nationality only when it is based on a genuine connection between the state and the individual. Common nationality in the formal sense between victim and defendant should not preclude individual criminal responsibility for grave breaches of the Geneva Conventions where there is no *de facto* linkage to bind them. This is especially true when the only nationality shared between them is that of a failed or disintegrating state. The jurisdictional scope and application of international humanitarian law, especially in its criminal law aspect, ought to reflect the interests of the international community and not just the interests of states in their nationals. The Trial Chamber’s approach to evaluating relative nationality of victims and the internationality of the armed conflict in Bosnia and Herzegovina was too rigid and mechanical, and it failed to take these interests into account.

Part II of this Article reviews the context of the Tribunal’s creation and considers how the state-centric nature of the international legal order has impeded the development of international humanitarian law. It briefly explores the development of individual criminal responsibility for violations of that law and links this process to the development of the international law of human rights since World War II. In this context, the creation of the Statute of the International Tribunal (“ICTY Statute”) can be seen as a further stage in the development of international law beyond its traditional state-centric origins.

Part III focuses on the procedural issues and threshold jurisdictional issues raised by the ICTY’s task of applying international humanitarian law as criminal law. Those accused of international crimes can be ensured a fair trial only if the elements of those crimes are clearly defined, yet the elements of crimes under international humanitarian law were not well defined when the ICTY was created. The principle of *nullum crimen sine lege*, which parallels the U.S. legal prohibition on *ex post facto* laws, must also be considered. After noting that the indictments of the ICTY typically charge those accused with two or three different overlapping crimes under international humanitarian law, this Part considers the fundamental fairness concerns raised by this practice and recommends possible new approaches to resolving them. It ends by discussing

<sup>19</sup> See *infra* text accompanying notes 138–52.

the essential jurisdictional prerequisites of all crimes within the jurisdiction of the ICTY. The effect of these prerequisites is to confine the jurisdiction of the ICTY to crimes of special international concern.

Part IV addresses the way that the ICTY Trial Chamber applied the concepts of nationality and internationality. It begins by highlighting the complex relationship between these two elements and the often blurred distinction between them. While the terms of the Geneva Conventions and of the ICTY Statute presently require proof of these two elements, this Part concludes that they can and should be applied more flexibly than they were by the majority of the Trial Chamber in the *Tadic* case.

Part V argues that the logical structure and effectiveness of international humanitarian law must be maintained in the face of the changing realities of armed conflict. It begins by touching upon the elements of crimes under international humanitarian law other than grave breaches. With this background, this Part then discusses the critical role of the grave breaches regime in requiring states to cooperate in the enforcement of international humanitarian law. The International Tribunal has established that it can and will impose international criminal responsibility for crimes against humanity and for violations of the laws and customs of war, but this Part concludes that this alone is insufficient. The Tribunal should be able to impose responsibility for grave breaches committed in the context of armed conflict of a mixed internal and international character. The Article offers some possible approaches to maintaining the effective scope of the grave breaches regime and considers some arguments for and against the extension of that regime.

Part VI offers a few observations and conclusions concerning the definition of crimes under international humanitarian law.

## II. HISTORICAL EVOLUTION: FROM STATE-CENTRIC ORIGINS TO INDIVIDUAL CRIMINAL RESPONSIBILITY

### A. *The State-Centric Nature of Traditional International Humanitarian Law*

States have a shared interest in defining their mutually agreed rights and duties during times of armed conflict. For their reciprocal benefit, they have agreed to regulate hostilities among themselves in order to soften the hardships of war.<sup>20</sup> The body of law created for this purpose, formerly known as the “law of armed conflict,” has more recently come to be known as “international humanitarian law.”<sup>21</sup> The original purpose of this law was to define the rights and duties of states in wartime with

<sup>20</sup> The process began with the first Geneva Convention of 1864 and continued with the Hague Conventions of 1899 and 1907, when the Geneva Convention was revised and expanded into the four Geneva Conventions of 1949 and their Protocols. The process has continued through the acceptance of related treaties such as the Genocide Convention. All of these treaties are discussed in greater detail below.

<sup>21</sup> See PICTET, *supra* note 4, at 1.

sufficient clarity to establish the legal responsibility of states for clear violations. But since violations of international humanitarian law are, in the final analysis, committed by people, it is important to establish that this law can be the basis for individual criminal responsibility as well. Only in this way will it possibly deter individuals from violating that law in the future. While national courts retain concurrent jurisdiction to try those accused of crimes within the ICTY's jurisdiction,<sup>22</sup> the ICTY was granted primacy over national courts<sup>23</sup> to ensure the fair and effective prosecution of these crimes despite the tensions resulting from years of war and ethnic conflict.

The Law of Geneva and the Law of The Hague together constitute the historical core of international humanitarian law, and they are firmly rooted in the state-centric international law of the nineteenth century. The Law of Geneva, which presently consists of the four Geneva Conventions of 1949 and their Optional Protocols, developed from the first Geneva Convention adopted in 1864.<sup>24</sup> The Law of The Hague resulted from the Hague Conventions of 1899 and 1907. Since World War II, international law has taken significant steps away from its state-centric origins.

The notion of moving beyond state-centrism is implicit in the idea of an international law of human rights, since the rights with which this law is concerned are those of individuals, or groups of individuals, rather than those of states. The very concept of internationally recognized human rights is in derogation of state sovereignty. While traditional state-centric approaches to international law insist upon a very broad definition of state sovereignty and a formalistic defense of it from any external intrusion, international humanitarian law requires some encroachment on sovereignty. The traditional concept of international law is inherently inadequate to the task of protecting the human rights and fundamental freedoms which the U.N. system has pledged to promote,<sup>25</sup> and it is also inadequate as the basis for imposing individual criminal responsibility for violations of international humanitarian law.

Until now, international law has not incorporated a general system of international criminal law or international criminal procedure, largely because these matters were considered to be exclusively within the province of states.<sup>26</sup> International humanitarian law recognized that

<sup>22</sup> See ICTY Statute, *supra* note 1, art. 9(1).

<sup>23</sup> See *id.* art. 9(2).

<sup>24</sup> Convention for the Amelioration of the Condition of the Wounded Armies in the Field, signed at Geneva, Aug. 22, 1864, 129 CONSOL. T.S. 361.

<sup>25</sup> Article 55 of the U.N. Charter states that the United Nations "shall promote . . . universal respect for, and observance, of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," and Article 56 states that "[a]ll members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." U.N. CHARTER, arts. 55-56.

<sup>26</sup> In discussing the declaration in Article 1 of the Genocide Convention that genocide is a "crime under international law," a 1985 Report on the Convention by the U.S. Senate Committee on Foreign Relations expressed skepticism about the entire concept and reduced it to a matter of municipal criminal law:



individual criminal responsibility for war crimes was appropriate, but it did not prescribe any particular modalities for achieving this.

Prior to the Geneva Conventions of 1949, states were under no formal obligation to prosecute for violations of international humanitarian law. If a state did decide to prosecute, it was free to rely on its own courts, its own legal procedures, and even its own substantive law.<sup>27</sup> Today, however, as international law evolves beyond its state-centric origins, the International Tribunal is developing international criminal law standards and procedures.

### *B. The Creation of the International Criminal Tribunal for the Former Yugoslavia*

The ICTY was created in 1993 by a decision of the U.N. Security Council.<sup>28</sup> The Security Council is charged with responsibility for maintaining and restoring international peace and security,<sup>29</sup> but it must often consider rules of international law and evaluate violations of that

The term "crime under international law" has a variety of meanings. As used in the Genocide Convention, it combines two ideas: internationally authorized municipal criminal law and municipal criminal law common to civilized nations. Parties to the Convention undertake to enact domestic legislation making genocide a municipal crime. Thus, common to the municipal law of all parties to the Convention is a proscription against genocide, a proscription enacted as part of each party's obligation under the Convention.

S. EXEC. REP. NO. 99-2, at 5 (1985), *reprinted in* 28 I.L.M. 760, 763 (1989).

<sup>27</sup> See, e.g., *United States v. Calley, Jr.*, 46 C.M.R. 1131 (1973). In much-publicized proceedings, the appellant was convicted by a general court-martial of three specifications of premeditated murder and one of assault with intent to commit murder in violation of Articles 118 and 134 of the Uniform Code of Military Justice (10 USC §§ 918, 934, respectively). He was sentenced to

dismissal, forfeiture of all pay and allowances, and confinement at hard labor for life. The convening authority approved dismissal and the forfeitures, but reduced the period of confinement to twenty years. The offenses were committed by First Lieutenant William L. Calley when he was performing as a platoon leader during an operation in the hamlet of My Lai (4) in Song My village, Quang Ngai Province, Republic of South Vietnam, on March 16, 1968. *Although all charges could have been laid as war crimes, they were prosecuted under the UCMJ.*

*Id.* at 1138 (emphasis added).

<sup>28</sup> See U.N. Doc. S/RES/827 (1993). The creation of the ICTY was based upon the Security Council's determination that widespread atrocities in the territory of the former Yugoslavia constituted a threat to international peace and security. For a useful analysis of the ICTY, see generally VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1995) (providing a documentary history and analysis of the ICTY); M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996) (describing the history, jurisdiction, procedures, and enforcement powers of the ICTY).

<sup>29</sup> Article 24(1) of the U.N. Charter provides that the members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security." U.N. Charter, art. 24(1).

law.<sup>30</sup> Never before, however, has it created a judicial organ.<sup>31</sup> The council specified that in this case it did so to put an end to the crimes being committed, to bring to justice the persons responsible, and to contribute to the restoration and maintenance of peace.<sup>32</sup>

International courts are nothing new. The centennial of the 1899 Hague Conference, which established the Permanent Court of Arbitration, is just around the corner.<sup>33</sup> The International Court of Justice has been deciding cases since the end of World War II,<sup>34</sup> and its predecessor in the Hague, the Permanent Court of International Justice, began functioning in 1922. All of the aforementioned courts were formed solely to decide legal disputes between states, and none of them has ever conducted a criminal trial. They were also "permanent" in the sense that they were created as standing institutions which, in theory, would remain available to resolve future disputes between states.<sup>35</sup>

The ICTY is the result of new conceptions of international law. Unlike the permanent institutions set up to deal with interstate conflict, the ICTY was created ad hoc to deal with the unique situation in the former Yugoslavia<sup>36</sup> and has jurisdiction to try individuals for serious violations of international humanitarian law.<sup>37</sup> If that ad hoc institution can conduct fair and impartial international criminal trials, it will contribute to the rule of law and to the restoration of peace in the former Yugoslavia. Discussions are also underway at the United Nations which may lead to

<sup>30</sup> See, e.g., U.N. Doc. S/RES/670 (1990) (condemning "the treatment by Iraqi forces of Kuwaiti nationals, including measures to force them to leave their own country and mistreatment of persons and property in Kuwait in violation of international law"); U.N. Doc. S/RES/1034 (1995) (condemning "in the strongest possible terms" violations of international humanitarian law and human rights by Bosnian Serb and paramilitary forces in Srebrenica, Zepa, Banja Luka and Sanski Most, "which show a consistent pattern of summary executions, rape, mass expulsions, arbitrary detentions, forced labour and large-scale disappearances").

<sup>31</sup> The International Military Tribunal at Nuremberg was established by an agreement between four victorious Allied Powers at the end of World War II. See generally Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279.

<sup>32</sup> See S.C. Res. 808, U.N. SCOR, U.N. Doc. S/RES/808 (1993); S.C. Res. 827, U.N. SCOR, U.N. Doc. S/RES/827 (1993).

<sup>33</sup> See generally Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779.

<sup>34</sup> See generally Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055.

<sup>35</sup> See Leo Gross, *Underutilization of the International Court of Justice*, 27 HARV. INT'L L. J. 571 (1986) (discussing the historical purposes of the International Court of Justice). One limitation common to all of these institutions is that they can decide a dispute only when the states concerned have in some way consented to their jurisdiction. This limits their utility even as a means for the settlement of disputes between states. *Id.* at 573-78.

<sup>36</sup> Another ad hoc tribunal, the International Tribunal for Rwanda (ICTR), was created to deal with a similarly disturbing situation in that country. See U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994). Unlike the Statute of the ICTY, the Statute of the ICTR does not mention grave breaches of the Geneva Conventions crimes within the jurisdiction of that Tribunal. Despite this difference, most of the discussion in this article applies to the ICTR as well.

<sup>37</sup> See ICTY Statute, *supra* note 1, art. 1.

the creation of a permanent International Criminal Court,<sup>38</sup> but the success of those negotiations will depend in no small part upon the success of the ICTY.

After a slow start, a number of those indicted for war crimes and crimes against humanity have come into the custody of the Tribunal, and some of the accused have already been tried and sentenced. In the coming months and years, as the Tribunal issues written judgments in yet more cases, a new and clearer articulation of the elements of these crimes will inevitably emerge from the Tribunal.

The Tribunal's subject matter jurisdiction extends to serious violations of international humanitarian law as defined in the ICTY Statute and by the applicable treaties and customary international law.<sup>39</sup> None of these, however, sets out in a comprehensive way the specific constituent elements of those offenses.<sup>40</sup> No international criminal tribunal has ruled on these issues since the Nuremberg<sup>41</sup> and Tokyo<sup>42</sup> war crimes tribunals fifty years ago,<sup>43</sup> and while there have been a number of prosecutions for these crimes before national courts, the present Tribunal must develop its own approach to defining the elements.

<sup>38</sup> See M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997).

<sup>39</sup> According to Article 1 of the ICTY Statute, "[t]he International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute." ICTY Statute, *supra* note 1, art. 1. Thus, the territorial scope of that jurisdiction is limited to the territory of the former Yugoslavia, and the temporal jurisdiction is limited to events occurring since January 1, 1991.

<sup>40</sup> See *Regina v. Finta*, 1 S.C.R. 701, 728 (1994) (LaForest, J., dissenting opinion). The dissent states:

War crimes and crimes against humanity are crimes under international law. . . . While some of these crimes have been given a considerable measure of definition in international documents, as a whole they have not been reduced to the precision one finds in a national system of law. Crimes against humanity, in particular, are expressed in compendious terms relying broadly on principles of criminality generally recognized by the international community.

*Id.*

<sup>41</sup> See Judgement of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (U.S. Gov't Printing Office, Nazi Conspiracy and Aggression, Opinion and Judgement), *reprinted in* 41 AM. J. INT'L L. 172 (1947) [hereinafter NUREMBERG JUDGEMENT].

<sup>42</sup> The International Military Tribunal for the Far East was established in Tokyo pursuant to the *Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Establishment of an International Tribunal for the Far East*, Jan. 19, 1946, T.I.A.S. No. 1589, 4 BEVANS 27 (amended Apr. 26, 1946).

<sup>43</sup> In the words of the *Tadic* defense pretrial brief: "The historical development of the law on individual [sic] criminal responsibility [sic] for violations of international humanitarian law is mainly on the abstract level, and no case law of international Tribunals is known since Tokyo and Nürnberg [sic]." Defendant's Pre-Trial Brief at 8122, Prosecutor v. Tadic, Case No. IT-94-I-T, (T.Ch.II May 7, 1997).

C. *The Development of Individual Criminal Responsibility for Violations of International Humanitarian Law*

The development of the international law of human rights since World War II has done more than create a few more rules of positive international law. It has begun to transform the nature of the international legal order itself. Michael Reisman has argued that the international law of human rights has rendered much of the pre-existing international law anachronistic,<sup>44</sup> and Philip Allot has lamented that international law "is trapped in the pre-Revolutionary world of the eighteenth century" and that "[t]he international law of the old regime is preventing the emergence of the new international society."<sup>45</sup> The international law of human rights requires adjustments in many areas of general international law. International humanitarian law needs even further refinement.

Although international humanitarian law predates the development of the modern international law of human rights, it too has evolved away from the state-centric view that violations are a matter of state responsibility rather than a basis for the imposition of individual criminal responsibility. Starting with the four Geneva Conventions of 1949, international humanitarian law treaties began to incorporate direct references to individual criminal responsibility. Each of these treaties defines a special category of "grave breaches" and obliges the parties "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed"<sup>46</sup> any of those grave breaches.

Similarly, states that were party to the 1948 Genocide Convention are required to "prevent and punish" genocide as defined in the Convention.<sup>47</sup> One narrow view of the Genocide Convention is that it is merely "an agreement among the parties to make certain acts criminal under their municipal laws and to prosecute individuals accused of violating them."<sup>48</sup> International criminal tribunals, however, must apply a body of law separate from the municipal law of any state or states.<sup>49</sup>

<sup>44</sup> See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 873 (1990).

<sup>45</sup> Philip Allot, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. 1, 25 (1988).

<sup>46</sup> Geneva Convention (IV), *supra* note 6, art. 146; *see also id.* art. 147 (defining the grave breaches), art. 148 (preventing states from absolving themselves from any responsibility for grave breaches). *See generally* Geneva Convention (I), *supra* note 15, arts. 45-49; Geneva Convention (II), *supra* note 15, arts. 50-52; Geneva Convention (III), *supra* note 15, arts. 129-31.

<sup>47</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, art. 1, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

<sup>48</sup> S. EXEC. REP. NO. 99-2, at 25 (1985), *reprinted in* 28 I.L.M. 760, 773 (1989).

<sup>49</sup> Article VI of the Genocide Convention mentions the possibility of prosecutions for genocide before a future international penal tribunal, but the 1985 Senate Report on that convention suggests that the text itself establishes neither the substantive law nor the procedures that such an international tribunal would apply:

The Nuremberg and Tokyo Tribunals at the end of World War II were the first international criminal courts to hold individuals responsible for violations of international humanitarian law. The ICTY represents a major step forward from the Nuremberg and Tokyo precedents in a number of ways. It applies a broader and better defined body of substantive international humanitarian law, much of which has been expanded and clarified since Nuremberg. The ICTY was created by the United Nations and is thus an international tribunal in the fullest sense, unlike the Nuremberg and Tokyo Tribunals, which were international military tribunals created by the victorious powers of World War II. The intervening development of the international law of human rights also means that the ICTY must respect international fair trial standards that did not exist at the time of the international military tribunals of the post-World War II era. The bar has been raised, so to speak, by these relatively new standards, which clearly bind the International Tribunal.<sup>50</sup>

In any fair trial on a criminal charge, certain specific and indispensable elements must be established as the basis for a conviction under the law. The definition of these elements is, or at least should be, an essential part of the criminal law of any country. It usually develops over time from a large body of practice and jurisprudence by national courts. The International Tribunal is now defining the elements of the crimes within its jurisdiction without the benefit of years of trial and error, but it need not start from scratch; it can draw upon the accumulated national jurisprudence of states in applying international humanitarian law to criminal trials.

The International Tribunal is not bound by the practice or decisions of any one state,<sup>51</sup> since the practice and jurisprudence of states in criminal law matters is quite diverse.<sup>52</sup> The ICTY must find its own path

The international penal tribunal contemplated by Article VI represents a sharp departure from the concepts contained in the Genocide Convention. The Convention is an agreement among the parties to make certain acts criminal under their municipal laws and to prosecute individuals accused of violating them. The notion of an international penal tribunal suggests the existence of a body of law separate from the municipal laws of the contracting parties. What this law would be and what procedures would govern in proceedings before the tribunal remain to be determined.

S. EXEC. REP. NO. 99-2, at 25, *reprinted in* 28 I.L.M. 760, 773.

<sup>50</sup> See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, para. 106, U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159 (1993) [hereinafter *Report of the Secretary-General*]; see also International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 14, 999 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

<sup>51</sup> The Rules of the ICTY state that "determinations of courts of any State are not binding on the Tribunal." ICTY R. PRO. & EVID. 12 (as amended Oct. 6, 1995), U.N. Doc. IT/32/Rev.6/1995. See generally ICTY R. PRO. & EVID. (amended Dec. 3, 1996), U.N. Doc. IT/32/Rev.10/1996 [hereinafter ICTY Rules]. Similarly, the Tribunal is not bound by any state's approach to criminal trial and procedure.

<sup>52</sup> The Tribunal is guided by definitions of war crimes, genocide, and crimes against humanity that are well established in international law, but no treaty or other rule of international law requires any *specific* form of criminal procedure. International human rights law does require a fair trial based on a presumption of innocence, but countries manage to achieve this objective in different ways. Two important legal systems with fundamentally different approaches are the common law system, followed in many areas formerly administered by the British, and

and build clearer international guidelines for the future. Applying international humanitarian law as a basis for individual criminal responsibility, without basing it upon a single clearly defined and established body of national criminal law jurisprudence, takes that law beyond its state-centric origins and reveals its shortcomings. One of the most evident of these is its failure to define the elements of international crimes.

### III. THRESHOLD ISSUES RAISED BY TRIALS BEFORE THE ICTY

If the ICTY is to impose international criminal responsibility consistent with international law, it must respect both the international fair trial rights of those accused and the general jurisdictional limits applicable to international humanitarian law. Thus, both the individual human rights of the post-World War II era and the more traditional sovereign prerogatives of states are at issue.

International fair trial standards require that the elements of the crimes charged be clearly identified and that they be proven prior to the conviction of the accused. The principle of *nullum crimen sine lege* likewise mandates that courts convict only for acts that were criminal when committed. An additional fair trial issue is raised by the overlapping scope and application of the different categories of crimes under international humanitarian law. At present, the same criminal acts may be subject to prosecution as grave breaches of the Geneva Conventions of 1949, as violations of the laws and customs of war, and as crimes against humanity, all of which fall within the jurisdiction of the ICTY.<sup>53</sup> Since the indictments issued by the Tribunal have often, and even routinely, charged those accused with counts under all three of these categories for many of the illegal acts alleged, an issue of double jeopardy must be resolved. Domestic legal systems resolve this problem through legal notions like that of the lesser included crime.<sup>54</sup> While a Trial Chamber of the ICTY recently addressed this issue for the first time on the international level, the matter has not yet been fully resolved, and international humanitarian law remains without doctrines or procedures to prevent multiple convictions for a single criminal act.

the civil law system, followed by most countries on the European continent and in many of their former colonies. In common law countries a fair trial is believed to result from the adversarial confrontation of two active sides. On the one hand there are the prosecuting attorneys who present evidence, question the witnesses, and make legal arguments supporting conviction. On the other are the defense attorneys responsible for presenting evidence and arguments to the opposite effect. The process is refereed by a judge who decides the issues of law but normally must leave it to the jury which, after being instructed in that law, decides the issues of fact and of ultimate guilt or innocence. In civil law countries the trial is based on an inquisitorial rather than an adversarial model, wherein the judge plays a more active role. He or she summons evidence, asks most of the questions of the witnesses, and has enormous discretion both to determine the conduct of the trial and to reach the verdict on the evidence. An even greater variance exists among criminal procedures if one looks beyond these two western models. See generally William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 7-10 (1992).

<sup>53</sup> See ICTY Statute, *supra* note 1, arts. 2-5.

<sup>54</sup> See *Blockburger v. United States*, 284 U.S. 299 (1932).

The narrowly defined scope of international humanitarian law limits its intrusion into matters of state sovereignty; thus, this body of law does not extend to most common crimes defined under domestic law. A number of jurisdictional prerequisites, set out in the ICTY Statute, ensure that it cannot encroach upon the jurisdiction of states over common crimes.

#### A. *Definition and Due Process*

There is little doubt about the need to define the elements of crimes, and such a definition is explicitly required by many national legal systems. In some civil law countries it is required by the penal code,<sup>55</sup> but, of course, no such code applies to the ICTY. The ICTY Statute, which defines the crimes within its jurisdiction, does not speak of the specific elements of those crimes nor does it fully define them. Those common law legal systems that guarantee the accused a right to trial by jury have a clear need to define the elements of crimes. In U.S. jurisprudence, for example, detailed formulations of the elements of crimes can readily be found, most often in cases relating to challenges by a convicted defendant to the instructions of law given by a trial judge to a jury.<sup>56</sup> The Hague Tribunal will not need to instruct a jury on the elements of crimes under international humanitarian law,<sup>57</sup> but it is nevertheless important to identify these elements as specifically as possible.

The international human rights standards found in the International Covenant on Civil and Political Rights (ICCPR)<sup>58</sup> and restated in the ICTY Statute<sup>59</sup> are highly relevant to the issue of why the elements of the crimes charged must be clearly identified. Article 14 of the ICCPR articulates those human rights that concern the proper administration of justice, and it is undisputed that these rights must be respected by the International Tribunal.<sup>60</sup> The fair trial requirements of this article largely

<sup>55</sup> See NOUVEAU CODE PÉNAL [N.C. PÉN.] arts. 111-13 (Fr.) ("Nul ne peut être puni pour un crime ou pour un délit dont les éléments ne sont pas définis par la loi, ou pour une contravention dont les éléments ne sont pas définis par le règlement.") [No one can be punished for a crime or misdemeanor whose elements have not been defined by law, or for an infraction whose elements are not defined by the applicable rules.] (author's own translation).

<sup>56</sup> Such instructions are necessary because while the trial by jury system leaves it to the jury to make factual determinations based on the evidence presented, the jury must apply the proper legal standards to those facts in order to determine the legal consequences. See, e.g., *Francis v. Franklin*, 471 U.S. 307 (1985) (holding that the jury instructions given in the case under review had created a mandatory evidentiary presumption that unconstitutionally shifted the burden of proof to the defendant).

<sup>57</sup> In trials before the ICTY, the three judges of the trial chamber hearing the case will decide the guilt or innocence of the accused by majority vote. See ICTY Statute, *supra* note 1, art. 23(2); ICTY Rules, *supra* note 51, Rule 87(A).

<sup>58</sup> See ICCPR, *supra* note 50, art. 14.

<sup>59</sup> ICTY Statute, *supra* note 1, art. 21 (discussing the rights of the accused).

<sup>60</sup> *Report of the Secretary-General*, *supra* note 50, para. 106:

It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in

reflect what the Anglo-Saxon common law refers to as “due process of law,”<sup>61</sup> but by virtue of their incorporation into the ICCPR these principles have been recognized to be of universal application. The principal thrust of Article 14 is contained in paragraph (1), which states that “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, *everyone shall be entitled to a fair and public hearing* by a competent, independent and impartial tribunal established by law.”<sup>62</sup> The paragraphs that follow set out in greater detail the requirements of fair trial in criminal cases.<sup>63</sup> Particularly relevant here is Article 14(2) which recognizes the right to be presumed innocent until proven guilty.<sup>64</sup> Unless the elements of the crimes charged are clearly established by the prosecuting authorities, the accused can not be proved guilty. It follows logically from the presumption of innocence that the prosecution must bear the burden of proving all the elements of the crimes charged,<sup>65</sup> and in light of Article 14(2) of the ICCPR, it is reasonable to conclude that this requirement has risen to the status of a general principle of criminal law accepted by the nations of the world.

Once it is acknowledged that the elements of the crimes charged must be clearly identified, the difficult task of defining those elements must be undertaken. The essential elements of a crime will often be defined differently in different jurisdictions.<sup>66</sup> Even in the United States,

particular, contained in article 14 of the International Covenant on Civil and Political Rights.

*Id.*

<sup>61</sup> “The adoption of an individual right to trial in court and detailed minimum guarantees of the accused in criminal proceedings is based on the *Anglo-Saxon common law* tradition of ‘*due process of law*’ which can be traced back to the Magna Carta Liberatum of 1215.” MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 236 (1993).

<sup>62</sup> ICCPR, *supra* note 50, art. 14(1) (emphasis added). Essentially the same standard appears in Article 21(2) of the ICTY Statute, which provides that “in the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute.” ICTY Statute, *supra* note 1, art. 21(2).

<sup>63</sup> “The right to a fair and public hearing before a tribunal in all suits at law and criminal matters pursuant to Art. 14(1) is the core of ‘due process of law.’ All the remaining provisions in Art. 14(2) to (7) and Art. 15 are specific formulations of the ‘fair trial’ in criminal cases.” NOWAK, *supra* note 61, at 241.

<sup>64</sup> “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” ICCPR, *supra* note 50, art. 14(2). This standard also appears in Article 21(3) of the ICTY Statute, which states, “The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.” ICTY Statute, *supra* note 1, art. 21(3).

<sup>65</sup> “The prosecution bears the burden of proving all *elements* of the offense charged . . . .” *Sullivan v. Louisiana*, 508 U.S. 276, 277–78 (1993) (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)) (emphasis added).

<sup>66</sup> In a 1979 extradition case, the High Court of Justice in England was confronted with differences between the definitions of burglary under English law and under the law of the District of Columbia in the United States. Under the relevant U.S. law, Section 1801(b) of Title 22 District of Columbia Code, entry as a trespasser is not an essential element of the crime of burglary, whereas under English law trespass is an essential element of the crime (see Theft Act 1968, § 9). The issue raised was whether the principle of “double criminality” should thus come into play so as to prevent the extradition of an accused from England to the District of Columbia to face charges of burglary. According to that principle, a criminal is only to be extradited for the commission of a crime punishable by the laws of both countries. The English court held:



where reference to elements is common due to the system of trial by jury, there are often disagreements as to these elements.<sup>67</sup> How then should the Tribunal go about defining them? There are two very important issues here. First, there is the question of what sources the Tribunal should look to for guidance in identifying these elements. The sources of the applicable law must be the same as the sources of all international law, i.e., international conventions, international custom, general principles of law; and as subsidiary sources, judicial decisions and the teachings of publicists.<sup>68</sup> These will be considered later in this Article, which examines the elements that differentiate grave breaches, crimes against humanity, violations of the laws and customs of war, and genocide.

Second, in considering the question of how to formulate these elements it is important to acknowledge that a certain amount of grammatical leeway is available. In some cases a required element might be susceptible to division into two sub-elements, but the possible consequences of any such division must first be considered. While it is essential to define the elements of the crimes, care must be taken to avoid an unnecessary proliferation of those elements. Proving that an accused is guilty of serious violations of international humanitarian law is not an easy task. When States prosecute their own nationals for wartime atrocities, they often bring charges under their domestic law rather than attempt to prove violations of international humanitarian law.<sup>69</sup> This is in part because it is generally more difficult to prosecute for war crimes than for domestic offenses.<sup>70</sup> An already difficult task would be

[D]ouble criminality in our law of extradition is satisfied if it is shown: (1) that the crime for which extradition is demanded would be recognised as substantially similar in both countries; (2) that there is a prima facie case that the conduct of the accused amounted to the commission of the crime according to English law.

*Re the Habeas Corpus Application of Morrison Budlong & Jane Kember*, 1 W.L.R. 1110, 1122-23 (Q.B. 1980).

<sup>67</sup> "As with many aspects of statutory construction, determination of what elements constitute a crime often is subject to dispute." *United States v. Michael E. Gaudin*, 115 S. Ct. 2310, 2321 (1995) (Rehnquist, J., concurring).

<sup>68</sup> Article 38(1) of the Statute of the International Court of Justice, which is generally considered to be the most authoritative enumeration of the sources of international law, identifies these sources as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59 (i.e. that only the parties are bound by the decision in any particular case), judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, at 1060.

<sup>69</sup> See *United States v. Calley, Jr.*, 46 C.M.R. 1131, 1135 (1973).

<sup>70</sup> As W. Hays Parks puts it:

Having prosecuted offenses that may have been characterized as war crimes during the U.S. involvement in the Vietnam War, for example, this reviewer is aware that it is much easier to gain conviction of an accused for the simple and well-established of-

complicated even further if the elements of crimes under international humanitarian law were broken down into an impossibly large number of subcomponents.<sup>71</sup>

### B. *The Nullum Crimen Principle*

Respect for the principles *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no penalty without law) requires that the Tribunal convict individuals only for violations of international humanitarian law that entail individual criminal responsibility under customary or conventional law applicable to the parties.<sup>72</sup> The *nullum crimen* principle reflects essentially the same considerations of justice as the prohibition of *ex post facto* laws under the U.S. Constitution.<sup>73</sup>

Individual criminal responsibility for grave breaches (ICTY Statute Article 2) and for genocide (Article 4) are clearly and directly established by the terms of the Geneva Conventions of 1949 and the Genocide Convention, respectively.<sup>74</sup> Likewise, the rule of customary international law establishing individual criminal responsibility for crimes against humanity (ICTY Statute Article 5) is evidenced by the

fense of murder than it is to allege—and prove—a war crime, particularly a new offense.

W. Hays Parks, Book Review, 28 GEO. WASH. J. INT'L L. & ECON. 207, 213 (1994) (reviewing HOWARD S. LEVIE, *TERRORISM IN WAR—THE LAW OF WAR CRIMES* (1993) and JUDITH G. GARDAM, *NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW* (1993)).

<sup>71</sup> One commentator wrote:

What trial prosecutors know is that every time you add an element of proof to the criminal case, even if it is a jurisdictional element, you are lessening the odds of a conviction. To be sure, in the Yugoslav case the fact-finding will be performed by trial judges, rather than jurors, and will require only a majority, rather than a unanimous verdict. But new prosecutors sometimes find to their surprise that judges can be even more demanding than jurors about factual proof, perhaps because they feel more trepidation deciding as a small chamber where the jury has the comfort of larger numbers. *Any new element of a crime diminishes the probability of a successful prosecution.*

Ruth Wedgwood, War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal, 34 VA. J. INT'L L. 267, 271 (1994) (emphasis added).

<sup>72</sup> In the course of the *Tadic* case the prosecution argued that under Article 15 of the ICCPR, the *nullum crimen* principle "can be satisfied by the application of the national law of the situs where the crime is committed or by international law, which includes both conventional and customary law, as well as the 'general principles of law recognized by the community of nations.'" Prosecutor's Reply Brief at D8151–D8152, *Prosecutor v. Tadic*, Case No. IT-94-1-T (T.Ch.II May 7, 1997). This is probably a correct statement with regard to the narrow issue of the *nullum crimen* principle, but it is not within the Tribunal's mandate and jurisdiction to convict on the basis of the national law of the situs if the acts concerned do not constitute a violation of applicable rules of international humanitarian law. Cf. ICTY Statute, *supra* note 1, art. 1 ("The International Tribunal shall have the power to prosecute persons responsible for *serious violations of international humanitarian law* committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute." (emphasis added)).

<sup>73</sup> See U.S. CONST. art. I, § 9, cl. 3; § 10, cl. 1; see also Jordan J. Paust, *It's No Defense: Nullum Crimen, International Crime and the Gingerbread Man*, 60 ALBANY L. REV. 657, 664–65 (1997).

<sup>74</sup> On the criminal responsibility for grave breaches, see *supra* note 46. Under Article 1 of the Genocide Convention the parties "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish." Genocide Convention, *supra* note 47, art. 1.

Nuremberg Charter<sup>75</sup> and by the 1946 resolution of the U.N. General Assembly affirming the principles of Nuremberg.<sup>76</sup> The issue of *nullum crimen sine lege* is most squarely raised by the application of penal sanctions to the various "unremunerated" acts that can qualify as violations of the laws and customs of war under Article 3 of the ICTY Statute.

In his report on the establishment of the Tribunal, the U.N. Secretary-General acknowledged that the issue of international criminal liability for violations of Common Article 3 was a controversial one.<sup>77</sup> Nonetheless, the ICTY Statute extends its jurisdiction to those violations. The *Tadic* defense team argued that the unsettled status of Common Article 3 as a basis of criminal responsibility raised questions of fundamental fairness and compromised the *nullum crimen* principle.<sup>78</sup> The ICTY rejected this argument and ruled that violations of Common Article 3 could legitimately be prosecuted.<sup>79</sup> Some doubts remain, however, concerning the normative status of these violations as crimes under international humanitarian law.<sup>80</sup>

Jordan Paust has argued that invocation of the principle of *nullum crimen sine lege* is no defense to prosecution for violations of customary international law or treaties.<sup>81</sup> Based on his study of the Nuremberg Judgment and of related jurisprudence of that era, he concludes that "[i]t is doubtful, then, that either the [International Military Tribunal] at Nuremberg or the subsequent Tribunal under Control Law No. 10 considered *nullum crimen sine lege* to be a principle of international law."<sup>82</sup>

<sup>75</sup> CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, *annexed to* The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279, art. 6(b).

<sup>76</sup> G.A. Res. 95, U.N. GAOR, 6th Comm., 1st Sess., pt. 1, 55th plen. mtg., U.N. Doc. A/64/Add.1 (1946). In this resolution, the General Assembly officially expressed its support for the principles of international law incorporated into the Nuremberg Charter.

<sup>77</sup> The Secretary General's report stated:

Although the question of whether [C]ommon [A]rticle 3 entails the individual responsibility of the perpetrator of the crime is still debatable, some of the crimes included therein, when committed against the civilian population, also constitute crimes against humanity and as such are customarily recognized as entailing the criminal responsibility of the individual.

*Report of the Secretary-General*, *supra* note 50, para. 12, n.8.

<sup>78</sup> The defense stated:

Customary law was classically established by state practice, where these states felt that they were under an international legal obligation to behave as they did. There seems to be an evolution in which it is less and less found that custom has developed into existence, but where it is decided, either by States or International bodies, that customary law [should] exist[.]. The vagueness of the normative rules and the tendency to decide that custom exists, rather than to find it existing, creates a serious risk of violation of the rule of legality, the *nullum crimen* principle."

Defendant's Pre-Trial Brief at D8121-D8122, Prosecutor v. Tadic, Case No. IT-94-I-T (T.Ch.II May 7, 1997).

<sup>79</sup> See Prosecutor v. Tadic, Case No. IT-94-I-AR72, Appeals Decision on Jurisdiction, paras. 128-36 (A.C. Oct. 2, 1995).

<sup>80</sup> See *infra* text accompanying note 121.

<sup>81</sup> See Paust, *supra* note 73, at 664-71.

<sup>82</sup> *Id.* at 666.

While the principle may not be part of positive international law, it has at the very least been recognized as a "principle of justice."<sup>83</sup> The International Tribunal cannot ignore this principle, but it can and should apply it flexibly.<sup>84</sup> Customary international law does not emanate from a legislature that can satisfy, by adopting a new criminal statute, all *nullum crimen* concerns for the future. Instead, it grows from the practice of states and adapts over time to the needs of the international community. Principles of justice will best be served if technical arguments do not allow impunity for an "attacker [who] must know that he is doing wrong."<sup>85</sup>

### C. *Overlapping Crimes*

The idea that the same acts can easily be characterized as different overlapping crimes is troubling both because it is logically inelegant and because it raises double jeopardy issues. In a better organized and more coherent legal order, this type of overlap would never occur. In practice, however, it is not uncommon. In countries where all crimes are defined by a single penal code, including most civil law systems, any overlap between crimes could conceivably be eliminated by amendment of that code. In legal systems in which crimes originate from multiple uncoordinated sources, the possibility of overlapping crimes is much greater. For example, in common law countries, crimes may be defined by the customary common law as well as by statute. In federal systems or in confederations, crimes may also be defined separately by the national government and by constituent sub-units such as provinces, cantons, or states.<sup>86</sup>

<sup>83</sup> The Judgement of the Nuremberg International Military Tribunal reaffirms the status of the principle even in dismissing it as legally inapplicable:

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is a general principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.

NUREMBERG JUDGEMENT, *supra* note 41, at 217.

<sup>84</sup> Paust argues:

It was also recognized that international crimes can be incorporated "by reference" in international instruments . . . that such crimes or their elements need not be defined with great particularity, that a tribunal can "determine the content" of relevant international law, that sentences need not be prescribed, and that there need not exist any mention of a forum for prosecution.

Paust, *supra* note 73, at 667.

<sup>85</sup> NUREMBERG JUDGEMENT, *supra* note 41, at 217.

<sup>86</sup> The widely reported case of the Rodney King beating in Los Angeles provides a good example. King is an African-American whose beating by white Los Angeles police officers was videotaped and so was available as evidence at the officers' criminal trial. After a suburban jury acquitted the police officers of most criminal charges under state law (involving the use of excessive force and assault under color of authority), these same officers were separately prosecuted by the federal government, and this time convicted, for violating King's civil rights, a crime under federal law. For the result of the federal trial, see *United States v. Koon*, 833 F. Supp. 769 (C.D. Cal. 1993).

The International Tribunal is neither a common law court nor a civil law court, but it has been called upon to apply a body of international humanitarian law that issues from many sources in an uncoordinated way. This law is not codified in a single place, and it does not emanate from a single sovereign source. In his separate opinion on the *Tadic* jurisdictional appeal, Judge Georges Abi-Saab noted that the loose formulation and substantial overlap of the crimes listed in Articles 2 through 5 of the ICTY Statute stem from the multiple origins of international humanitarian law.<sup>87</sup> One way or the other, the International Tribunal must address the situation created by this lack of legal coherence.<sup>88</sup>

The ICTY may choose between two possible means of dealing with this problem. On the one hand, it could attempt to eliminate incoherence through a creative reinterpretation of the law as Judge Abi-Saab's separate opinion suggests.<sup>89</sup> For the most part, though, the Tribunal has chosen the other possible solution, adhering to what the Secretary-General's report described as its "task of applying existing international law."<sup>90</sup> It is the state of this existing law that creates overlapping international crimes and causes the overlapping blocks of charges found in the International Tribunal's indictments.

The problem is that the existing international law defines international crimes with a substantial degree of overlap. Each of these blocks covers multiple categories of charges, including grave breaches, violations of the laws and customs of war, and crimes against humanity. In some cases, these blocks also cover multiple possible characterizations of these acts within each category. A review of the different counts in the first twelve indictments of the ICTY and of the alleged illegal acts to which they relate indicates that multiple criminal charges for a single act are the norm in these indictments. A summary of the results of that review appears in Table A, which shows that 66.8% of the time those accused of an illegal act are charged with three separate crimes in three separate counts. Only 16.3% of the time does the allegation of an illegal act result in only a single criminal charge.

<sup>87</sup> As Judge Abi-Saab has noted, the various categories of serious violations of international humanitarian law that the Tribunal was established to prosecute

were articulated in a highly emotional atmosphere in the various fora where such reverberations of revulsion could find a way to legal expression, by reaching for the proscribed acts and practices from all possible angles and by all conceivable legal ways and means. This led to a relatively loose normative formulation and a large degree of overlap between these crimes.

Prosecutor v. Tadic, Case No. IT-94-I-AR72, Appeals Decision on Jurisdiction (A.C. Oct. 2, 1995) (separate opinion of Judge Abi-Saab, pt. I, para. 2).

<sup>88</sup> See *id.* para. 6.

<sup>89</sup> See *infra* notes 240–45 and accompanying text.

<sup>90</sup> *Secretary-General's Report*, *supra* note 36, para. 29. The report also stated:

It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to 'legislate' that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.

*Id.*

**TABLE A****Counts charged in the first twelve indictments of the ICTY:<sup>91</sup>****Total number of counts charging:**

Grave breaches	144
Violations of laws and customs of war	153
Crimes against humanity	156
Genocide	9
<i>Total Number of Counts</i>	<i>462</i>

**Charges relating to the illegal acts alleged in those indictments:****Acts alleged for which:**

3 categories of crimes are charged:	123	(66.8%)
Grave breaches		
Violations of the laws and customs of war		
Crimes against humanity		
2 categories of the above crimes are charged	22	(12.0%)
1 category of the above crimes is charged	30	(16.3%)
Genocide is charged	9	(4.9%)
<i>Total Illegal Acts Alleged</i>	<i>184</i>	

The *Tadic* indictment provides a good example of the Tribunal's multiple charges. For the killing of Emir Karabasic, Jasmin Hrnica, and others, as well as inhumane acts against "G" and "H" in Omarska Camp, the indictment charges Tadic with willful killing as a grave breach under Article 2(a) of the ICTY Statute, with murder as a violation of the laws and customs of war under Common Article 3(1)(a), and with murder as a crime against humanity under Article 5(a) of the Statute.<sup>92</sup> These three counts refer to the same criminal acts, but accord them three different and independent legal characterizations which, the prosecutor has stressed, are not offered as mere alternatives to one another.<sup>93</sup> A review of the different counts in the first twelve indictments of the ICTY and of the allegations of illegal acts to which they relate indicates that

<sup>91</sup> See Research of Bartram Brown, Table C (unpublished manuscript, on file with the *Stanford Journal of International Law*).

<sup>92</sup> See Indictment of Dusko Tadic & Goran Borovnica, Case No. IT-94-I-I (T.Ch. Dec. 14, 1995) (as amended) (counts 5, 6, 9).

<sup>93</sup> Four out of the first 12 indictments formulated by the ICTY allege charges in the alternative. See Meakic & Others, Case No. IT-95-4 (T.Ch. Feb. 13, 1995) (counts 19.4, 19.7, 19.13, 20.3, 21.3, 22.3, 22.6, 22.9, 22.12, 22.15, 23.3, 24.3, 24.6, 24.9, 24.12, 25.3, 26.3, 27.3, 28.3, 29.3, 29.3, 20.3, 31.3) (accused: Meakic, Kvočka, Pracac, Radic, Kos, and Gruban, in their capacity as superiors); Tadic & Borovnica, Case No. IT-94-I-I (T.Ch. Dec. 14, 1995) (as amended) (counts 3, 27, 28); Sikirica & Others, Case No. IT-95-8-I (T.Ch. July 21, 1995) (counts 18.10, 19.1.4, 24.4, 25.2) (accused: Dusko Sikirica); Martić, Case No. IT-95-11-I (T.Ch. July 25, 1995) (counts 2, 4); Rajić ("Stupni Do"), Case No. IT-95-12-I (T.Ch. Aug. 23, 1995) (counts 4, 5, 6).

multiple criminal charges for a single criminal act are the norm in these indictments.<sup>94</sup>

The *Tadic* indictment also includes multiple charges. When the indictment claims Tadic beat prisoners and forced two of them to commit degrading sexual acts and mutilation, it charges him with two separate offenses within the category of grave breaches,<sup>95</sup> one violation of the laws and customs of war,<sup>96</sup> and a crime against humanity.<sup>97</sup> Similar blocks of charges are evident in other ICTY indictments.

If the Prosecutor's Office charges the accused with multiple overlapping counts in the indictment, it is possible that the accused may be convicted of more than one count for the same act. Consequently, it is crucial to determine whether multiple convictions on the basis of a single act would be prejudicial to an accused.<sup>98</sup>

As there is no agreed hierarchy of crimes under international humanitarian law,<sup>99</sup> the problem cannot necessarily be resolved as it would be under some national legal systems, by convicting the accused only of the most serious charge proved and dismissing any other charges proved as "lesser included offenses."<sup>100</sup> The prosecution has argued that

<sup>94</sup> Occasionally, the prosecutor has framed counts in the indictment in the alternative. See Research of Bartram Brown, Table C (unpublished manuscript, on file with the *Stanford Journal of International Law*).

<sup>95</sup> The grave breaches counts are torture or inhuman treatment under Article 2(b), and willfully causing great suffering or serious injury to body or health under Article 2(c). See Indictment of Dusko Tadic & Goran Borovnica, Case No. IT-94-I-I (T.Ch. Dec. 14, 1995) (as amended) (counts 10-11).

<sup>96</sup> See *id.* (count 8, charging Tadic with cruel treatment under Common Art. 3(1)(a) of the Geneva Conventions).

<sup>97</sup> See *id.*, count 13 (charging Tadic with inhumane acts under Article 5(i) of the ICTY Statute).

<sup>98</sup> It is interesting to note, in this context, that for most of the illegal acts for which Tadic was convicted, the Trial Chamber found him guilty of both a violation of the laws and customs of war under Article 3 of the ICTY Statute and a crime against humanity under Article 5. This seems to be incompatible with the Appeals Chamber's earlier decision on jurisdiction, which held that "Article 3 thus confers on the International Tribunal jurisdiction over any serious offense against international humanitarian law *not covered by Article 2, 4 or 5.*" *Prosecutor v. Tadic*, Case No. IT-94-I-AR72, Appeals Decision on Jurisdiction, para. 91 (A.C. Oct. 2, 1995) (emphasis added).

<sup>99</sup> The New French Penal Code incorporates an explicit hierarchy of crimes, based upon their gravity, in its first article: "Les infractions pénales sont classées, suivant leur gravité, en crimes, délits et contraventions." (Penal violations are classified according to their severity.) N.C. PÉN. art. 111-1 (Fr.). This code, which entered into force on March 1, 1994, see JOSÉE GRYNBAUM & DIDIER SAFAR, *LE NOUVEAU CODE PÉNAL: DROIT ET SOCIÉTÉ* 2 (1994), could be seen as extending that principle to crimes against humanity, placing genocide at the top of the hierarchy as the most serious form of crime against humanity. See N.C. PÉN. arts. 211-1 to 213-5 (Fr.). While the approach adopted by France is of great interest, it does not suffice to create, in international law, a hierarchy of serious violations of international humanitarian law corresponding to logically organized classifications of crimes under the French Penal Code.

<sup>100</sup> At least one Trial Chamber of the ICTY has endorsed the notion that genocide is indeed a form of crime against humanity, as suggested by the French Penal Code. See N.C. PÉN., art. 211-1 (Fr.); *Prosecutor v. Tadic*, Case No. IT-94-I-T, Sentencing Judgment, para. 8 (T.Ch.II July 14, 1997) (observing that while the Penal Code of the Former Republic of Yugoslavia did not prescribe any particular penalty for crimes against humanity, "genocide, itself a specific form of crime against humanity, is dealt with in Article 141 of the SFRY Penal Code which prescribes a similar range of penalties").

multiple convictions do not present a problem,<sup>101</sup> and that because each charge concentrates on a different aspect of the accused's acts, counts in the alternative are unnecessary.<sup>102</sup> In its ruling on a challenge to the form of the indictment in the *Tadic* case, the Trial Chamber agreed with the prosecution's basic position that multiple convictions for the same acts would not be prejudicial, by ruling that any potential problem arising from multiple convictions can properly be dealt with during the sentencing phase.<sup>103</sup> As a result, after *Tadic*'s conviction, his various sentences were set to run concurrently, thereby avoiding the possibility of his serving multiple sentences for the same illegal acts.<sup>104</sup>

If, by a single act of murdering a civilian, an accused were to be convicted of committing a grave breach of the Geneva Convention, an act of genocide and a crime against humanity, the Trial Chamber has ruled that he should be sentenced only once for these redundant crimes. But accommodations made at the stage of sentencing may not be the best way to deal with multiple criminal characterizations of the same acts. It seems simpler to address the problem at any of four separate points during the process of investigation, indictment and trial. The Prosecutor's

<sup>101</sup> The prosecution stated:

Because each of these Articles has a distinct purpose and object and, as a consequence, contain different elements, it is permissible that they be charged together in the instance where a particular act is violative of each and the accused, if guilty, should be subject to conviction for each. It may well be that for purposes of sentencing, the various offenses must be merged into one to provide for one sentence no greater than the aggregate of the individual offences, but that issue is not germane at this time.

Prosecutor v. *Tadic*, Case No. IT-94-I-T, Response to the Motion of the Defence on the Form of the Indictment, at D2344, D2337 (1995).

<sup>102</sup> The prosecution stated:

There are also instances in the present indictment, notably the charges set forth under the general paragraphs 5, 10, and 11, where the accused is, in essence, charged in the alternative. In those instances, for each particular victim where the accused is charged with the death of the victim, the accused is also charged in the alternative with offenses related to subjecting the victim to physical or mental harm in the event that the proof of the victim's death is insufficient. In the Statute and Tribunal Rules there is no provision for automatically included lesser offenses. Therefore, it is legally permissible to allege some offenses in the alternative for contingencies of proof.

*Id.* at D2337–D2336.

<sup>103</sup> Turning now to the second ground of attack on the indictment, it is complained that the indictment alleges, in respect of each paragraph alleging criminal conduct by the accused, several distinct offenses, expressed as cumulative rather than as in the alternative:

The only ground urged in support of this complaint is that it is contrary to the law of the former Yugoslavia and of the Republic of Bosnia and Herzegovina. This is said to be material if there are convictions in respect of any of the counts and there therefore arise questions of penalty.

There appears to be dispute as between the parties as to the requirements of Yugoslavia law and the law of its successor States. In any event, *since this is a matter that will only be at all relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration.* What can, however, be said with certainty is that *penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative.* What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading.

Prosecutor v. *Tadic*, Case No. IT-94-I-T, Decision on a Preliminary Motion on the Form of the Indictment, paras. 15–17 (T.Ch.II. Nov. 14, 1995) (emphasis added).

<sup>104</sup> *Id.*, Sentencing Judgment, paras. 8, 75 (T.Ch.II July 1997).



Office, in preparing future indictments, could modify its approach so as to plead the overlapping charges in the alternative.<sup>105</sup> At the next stage, the judges, when asked to confirm the indictments formulated by the prosecutor, could require that any different characterizations of the same criminal acts be formulated in the alternative as a condition of that confirmation.<sup>106</sup> At yet a third stage, the judges of the Trial Chambers have the authority to send defective indictments back to the prosecutor's office for reformulation,<sup>107</sup> or judges could simply decide to make their determinations of guilt, if any, in the alternative.<sup>108</sup>

<sup>105</sup> Under the Statutes of the ICTY and of the ICTR it is the prosecutor who formulates the original indictment. See ICTY Statute, *supra* note 1, art. 18(4); Statute of the International Tribunal for Rwanda, Annex to Resolution 955 (1994), U.N. SCOR, ?? Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598, art. 17(4) [hereinafter ICTR Statute].

<sup>106</sup> The next step after indictment in the *prétrial* process of the ICTY and the ICTR is the review of the indictment by a judge. Both the ICTY and ICTR provide in nearly identical language that "[t]he judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed." ICTY Statute, *supra* note 1, art. 19(1); see also ICTR Statute, *supra* note 105, art. 18(1). In an optional and interpretive written decision confirming an indictment, one judge of the ICTY has interpreted this provision to require a review of the facial sufficiency of the charges under the indictment:

The review of the indictment by a judge under our procedures, has two separate and distinct components. First, the Judge should make an assessment of whether, from the face of the indictment, it is alleged that the accused committed acts which, if proven beyond a reasonable doubt, are crimes as charged and are within the subject matter jurisdiction of the International Tribunal. . . . The second component of the review, however, entails an examination of the material accompanying the indictment. In a sense, the Judge is then discharging a function akin to that of an examining magistrate (*juge d'instruction*) or of a grand jury helping to ensure that the prosecution will not be frivolous or wilful.

Prosecutor v. Kordic, Blaskic, Cerkez, Santic, Skopljak and Aleksovski, Case No. IT-95-14-I, Decision on the Review of the Indictment, (T.Ch.II 1995) (Confirming Judge Gabrielle Kirk McDonald).

After a first informal review of the indictment the confirming judge may question the prosecutor concerning the legal theories behind the charges and the sufficiency of the evidence to sustain the charges before deciding whether to confirm some or all of the counts in the indictment. As part of this process, the judge must decide whether "it is alleged that the accused committed acts which, if proven beyond a reasonable doubt, are crimes as charged." See *id.* This provides the confirming judge with the authority to refuse confirmation of any indictment that charges crimes in an unacceptably cumulative way. The indictment, as ultimately confirmed, may be transformed by this process of dialogue between the judge and the prosecutor concerning the appropriate terms of the indictment.

Under the ICTY's Rules of Procedure and Evidence, "[t]he Judge of the Trial Chamber who reviews an indictment against an accused . . . shall not sit as a member of the Trial Chamber for the trial of that accused." ICTY Rules, *supra* note 51, Rule 15(C).

<sup>107</sup> See Prosecutor v. Tadic, Case No. IT-94-I, Decision on the Motion of the Defence on the Form of the Indictment, para. 14 (T.Ch.II Nov. 14, 1995) (upholding the defense's challenge to paragraph four of the *Tadic* indictment on the ground of imprecision, and sending it back to the prosecutor with leave to amend).

<sup>108</sup> The Rules of the ICTY provide that after hearing the evidence and deliberating, "[t]he Trial Chamber shall vote separately on each charge contained in the indictment." ICTY Rules, *supra* note 51, Rule 87(B). Thus, if their interpretation of the law required it, the judges have the leeway to find an accused guilty of only the most serious of the multiple overlapping charges for the same acts.

#### D. Common Jurisdictional Prerequisites

Article 1 of the ICTY Statute sets out three general limitations upon the jurisdiction of the Tribunal to prosecute persons for criminal acts.<sup>109</sup> First, there is the territorial limitation that the acts concerned must have been “committed in the territory of the former Yugoslavia.”<sup>110</sup> The temporal limitation is that those acts must have been committed “since [the beginning of] 1991,” and last, those acts must constitute “serious violations” of international humanitarian law.<sup>111</sup> The territorial and temporal requirements are fairly straightforward and do not require further elaboration here. A discussion of how to distinguish serious violations of international humanitarian law from common crimes follows the analysis of the requirement of armed conflict, an element common to most, but not all, crimes within the ICTY’s jurisdiction.

##### 1. The Requirement of Armed Conflict

All the crimes within the jurisdiction of the Tribunal, except for genocide,<sup>112</sup> must be committed in the context of an “armed conflict.”<sup>113</sup> Prior to Tadic’s trial, the Appeals Chamber reviewed evidence concerning the situation in the former Yugoslavia and ruled that the alleged crimes were committed in the context of an armed conflict.<sup>114</sup> After

<sup>109</sup> ICTY Statute, *supra* note 1, art. 1 (“The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.”).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See Genocide Convention, *supra* note 47, arts. 2, 3. Neither Article 4 of the ICTY Statute, nor the Genocide Convention upon which that article is based, requires any context of armed conflict in order for the enumerated acts to qualify as genocide. See also *Prosecutor v. Tadic*, Case No. IT-94-I-AR72, Appeals Decision on Jurisdiction, paras. 78, 140, 141 (A.C. Oct. 2, 1995) (recognizing that customary international law no longer requires any nexus between crimes against humanity and armed conflict, even though the ICTY Statute explicitly, if somewhat conservatively, maintains the requirement that such crimes be committed in armed conflict).

<sup>113</sup> *Prosecutor v. Tadic*, Case No. IT-94-I-T, Opinion and Judgment, para. 559 (T.Ch.II May 7, 1997). Discussing the charges against Dusko Tadic that were brought under Articles 2, 3, and 5 of the ICTY Statute, the Trial Chamber in that case noted:

Each of the relevant Articles of the Statute, either by its terms or by virtue of the customary rules which it imports, proscribes certain acts when committed “within the context of” an “armed conflict.” Consequently, it is necessary to show, first, that an armed conflict existed at all relevant times in the territory of the Republic of Bosnia and Herzegovina.

*Id.*

<sup>114</sup> See *Prosecutor v. Tadic*, Case No. IT-94-I-AR72, Appeals Decision on Jurisdiction, para. 70 (A.C. Oct. 2, 1995). The Appeals Chamber ruled:

[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law

hearing the evidence at trial, the Trial Chamber made specific findings that at all relevant times, an armed conflict of sufficient scope and intensity was taking place to justify the application of the laws and customs of war under Article 3 of the ICTY Statute,<sup>115</sup> the grave breaches provisions of the Geneva Conventions of 1949,<sup>116</sup> and by implication, the application of Article 5 on crimes against humanity.<sup>117</sup>

## 2. *The Nexus Between the Acts Charged and the Armed Conflict*

Although acts that are violations of international humanitarian law will often constitute common crimes under domestic law as well, it is important to maintain a distinction between the two. It is only serious violations of international humanitarian law that constitute international crimes within the jurisdiction of the Tribunal.<sup>118</sup> Furthermore, without some clear criterion of distinction, international humanitarian law could be applied to any crime committed in a war zone, even if completely unrelated to the actual conflict. Such a broad application could seriously dilute the specific nature of international humanitarian law.

In deciding the *Tadic* case, the Trial Chamber addressed the need for a link between the crime and the conflict. Both the prosecution and the defense in that case presented arguments on this issue in their pre-trial briefs. The Prosecutor's Office implicitly rejected the need for any distinction between war crimes and common crimes, and in its brief to Trial

continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. . . . These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts.

*Id.*

<sup>115</sup> Specifically, the Trial Chamber found:

[A]t all relevant times, an armed conflict was taking place between the parties to the conflict in the Republic of Bosnia and Herzegovina of sufficient scope and intensity for the purposes of the application of the laws or customs of war embodied in Article 3 common to the four Geneva Conventions of 12 August 1949, applicable as it is to armed conflicts in general, including armed conflicts not of an international character.

Prosecutor v. Tadic, Case No. IT-94-I-T, Opinion and Judgment, para. 568 (T.Ch.II May 7, 1997).

<sup>116</sup> See *id.* para. 569:

It is clear from the evidence before the Trial Chamber that, from the beginning of 1992 until 19 May 1992, a state of international armed conflict existed in at least part of the territory of Bosnia and Herzegovina. . . . It suffices for the moment to say that [after that date] the level of intensity of the conflict . . . was sufficient to meet the requirements for the existence of an international armed conflict for the purposes of the Statute.

*Id.*

<sup>117</sup> Following the earlier decision of the Appeals Chamber on jurisdiction, the Trial Chamber ruled that "[a]n armed conflict exists for the purposes of the application of Article 5 if it is found to exist for the purposes of either Article 2 or Article 3." *Id.* para. 559.

<sup>118</sup> See ICTY Statute, *supra* note 1, art. 1.

Chamber, argued that the application of international humanitarian law in the *Tadic* case does not require the establishment of any nexus between the commission of the crimes and the armed conflict, other than the simple fact that the crimes charged were committed "in the context" of an armed conflict.<sup>119</sup> In its reply, the *Tadic* defense team stressed that nothing decided by the Appeals Chamber in its preliminary decision on jurisdiction could be decisive on the important factual issue of whether a sufficient link existed between the armed conflict and the alleged crimes.<sup>120</sup>

The Report of the Secretary-General, which was the basis for the adoption of the statute by the Security Council, also makes it clear that the Tribunal is to apply existing international humanitarian law and not domestic law.<sup>121</sup> Without the requirement of a link between the acts alleged to violate international humanitarian law and the surrounding armed conflict, there is no definable distinction between murder as a war crime and murder as a violation of domestic law. The Trial Chamber's decision recognized this:

<sup>119</sup> The prosecutor stated:

The nexus required between the commission of the crimes and the conflict is described by the Appeals Chamber as "only a relationship between the conflict and the [acts], not that the [acts] occurred in the midst of a battle." . . . As regards the present case, however, the Appeals Chamber has already decided the nexus issue, wherein it held that all of the crimes with which the accused is charged were committed in the context of an armed conflict. . . . The only remaining issue of proof as regards the existence of armed conflict for Article 2 is the nature of the conflict.

Prosecutor v. *Tadic*, Case No. IT-94-I, D7884-D7883 (T.Ch.II Apr. 10, 1996).

<sup>120</sup> The defense stated:

[We agree] with the Prosecutor that the Appeals Chamber has established that there was a sufficient nexus between the armed conflict and the alleged crimes. This decision has however been taken in the context of a preliminary decision on jurisdiction. No evidence has been presented by either parties [sic] as to the facts underlying the decision, which may be understandable in the limited context of a decision on jurisdiction. The mere fact that the defence has offered no contrary evidence to what the indictment states and that it admitted that in the Prijedor region there were detention camps not run by the central authorities of Bosnia Herzegovina is not a sufficient link between the armed conflict and the alleged crimes. The Defence cannot understand how it is expected to offer any contrary evidence to what the Prosecutor has not yet proven until then. Does the mere fact that certain facts have been stated in the indictment create an obligation for the defence to offer contrary evidence?

Defendant's Pre-Trial Brief at 8106-07, *Prosecutor v. Tadic*, Case No. IT-94-I (T.Ch.II Apr. 23, 1996).

<sup>121</sup> See *Report of the Secretary-General*, *supra* note 50, para. 34:

In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

*Id.*; see also *id.* para. 36 ("[S]uggestions have been made that the international tribunal should apply domestic law in so far as it incorporates customary international humanitarian law. While international humanitarian law . . . provides a sufficient basis for subject-matter jurisdiction, there is one related issue which would require reference to domestic practice, namely, penalties.")

The existence of an armed conflict or occupation and the applicability of international humanitarian law to the territory is not sufficient to create international jurisdiction over each and every serious crime committed in the territory of the former Yugoslavia. For a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law.<sup>122</sup>

The Trial Chamber found Tadic's offenses to be linked to armed conflict in Bosnia and Herzegovina because they were carried out in pursuit of the Republika Srpska's goal to create an ethnically pure state<sup>123</sup> and in some cases were committed with the "connivance or permission of the authorities" of Bosnia and Herzegovina as part of an "accepted policy towards prisoners" in camps run by those authorities.<sup>124</sup>

The Tribunal's recognition that all crimes within its jurisdiction must have a sufficient nexus to the armed conflict increases the prosecution's burden in seeking to convict those indicted. However, this burden is justified by the ICTY Statute, which limits its jurisdiction to "serious violations of international humanitarian law."<sup>125</sup>

#### IV. GRAVE BREACHES IN THE *TADIC* DECISION

Each of the four Geneva Conventions of 1949 specifically defines a number of grave breaches that are subject to a special regime of enforcement by all the states who are parties.<sup>126</sup> It is clear from the text of these conventions that a grave breach occurs only when two conditions have been met: "internationality" in the sense there is an "international armed conflict" as required by Article 2,<sup>127</sup> and the existence of a victim

<sup>122</sup> Prosecutor v. Tadic, Case No. IT-94-I-T, Opinion and Judgment, para. 572 (T.Ch.II May 7, 1997).

<sup>123</sup> See *id.* para. 574. "Given the nature of the armed conflict as an ethnic war and the strategic aims of the Republika Srpska to create a purely Serbian State, the acts of the accused during the armed take-over and ethnic cleansing of Muslim and Croat areas of Opstina Prijedor were directly connected with the armed conflict."

<sup>124</sup> *Id.* para. 575. The Trial Chamber also stated:

Secondly, there are the acts of the accused in the camps run by the authorities of the Republika Srpska. Those acts clearly occurred with the connivance or permission of the authorities running these camps and indicate that such acts were part of an accepted policy towards prisoners in the camps in Opstina Prijedor. Indeed, such treatment effected the objective of the Republika Srpska to ethnically cleanse, by means of terror, killings or otherwise, the areas of the Republic of Bosnia and Herzegovina controlled by Bosnian Serb forces. Accordingly, those acts too were directly connected with the armed conflict.

*Id.*

<sup>125</sup> ICTY Statute, *supra* note 1, art 1.

<sup>126</sup> See *supra* text accompanying note 46.

<sup>127</sup> See Prosecutor v. Tadic, Case No. IT-94-I-AR72, Appeals Decision on Jurisdiction, paras. 79-84, 91 (A.C. Aug. 19, 1995) (concluding that "in the present state of the development of the law, Article 2 of the Statute only applies to offenses committed within the context of international armed conflicts"); see also Geneva Conventions (I)-(IV), *supra* notes 6 & 15, art. 2.

or victims classified as “protected persons” under one of the Geneva Conventions.<sup>128</sup>

The relationship between these two requirements is a complex one—so complex, in fact, that the Trial Chamber in the *Tadic* case seemed to collapse them into a single requirement.<sup>129</sup> They are indeed separate elements. The first, *internationality*, concerns the nature of the surrounding armed conflict, and turns on the question of whether more than one state is involved. In contrast, the “protected persons” issue concerns the *nationality* of the victims as individuals. The two issues are closely related, however, because the definition of “protected persons” under the Geneva Convention (IV) requires that the victims be “in the hands of a party to the conflict or Occupying Power” of a different nationality.<sup>130</sup> The difference in nationality at the heart of this definition is another form of internationality.

#### A. *International Armed Conflict as Defined by the ICTY*

There has been controversy from the start about whether the ICTY should require proof of international armed conflict as an element of grave breaches under Article 2 of its Statute. The text of Common Article 2 found in each of the Geneva Conventions of 1949 clearly limits the application of those conventions to “cases of . . . armed conflict which may arise between two or more of the High Contracting Parties . . . [and] cases of partial or total occupation of the territory of a High

<sup>128</sup> The definition of “protected persons” that applies to acts of violence against civilian persons is the most relevant here. That definition states: “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” Geneva Convention (IV), *supra* note 6, art. 4.

<sup>129</sup> The Trial Chamber’s opinion case acknowledges that the character of the armed conflict as international or internal is a key issue and promises to return to this issue in a subsequent section of the opinion:

[T]he extent of the application of international humanitarian law from one place to another in the Republic of Bosnia and Herzegovina depends upon the particular character of the conflict with which the Indictment is concerned. This depends in turn on the degree of involvement of the VJ and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) after the withdrawal of the JNA on 19 May 1992. That issue will be dealt with in Section VI. B of this Opinion and Judgment.

Prosecutor v. *Tadic*, Case No. IT-94-I-T, Opinion and Judgment, para. 571 (T.Ch.II May 7, 1997). The focus of the section referred to, however, is not upon the character of the armed conflict as such, but upon the related issue of whether the civilian victims concerned are “protected persons” within the definition of the Geneva Convention (IV) of 1949. Indeed, the section concludes with the observation:

[S]ince Article 2 of the Statute is applicable only to acts committed against “protected persons” within the meaning of the Geneva Conventions, and since it cannot be said that any of the victims, all of whom were civilians, were at any relevant time in the hands of a party to the conflict of which they were not nationals, the accused must be found not guilty of the counts which rely upon that Article.

*Id.* para. 608.

<sup>130</sup> See Geneva Convention (IV), *supra* note 6, art. 4.

Contracting Party.”<sup>131</sup> The emphasis here, as in most treaties, is upon protecting the interests of the contracting states on the basis of reciprocity. An initial question to be decided by the judges of the International Tribunal was whether Article 2 of the ICTY Statute, in referring to “grave breaches of the Geneva Conventions of 1949,” incorporated other parts of those treaties that make international armed conflict an essential element of these crimes.

Before Tadic’s trial his defense lawyers filed a preliminary motion challenging the Tribunal’s jurisdiction to try him for crimes committed in the context of internal armed conflict.<sup>132</sup> The Trial Chamber initially ruled that Article 2 could be applied to crimes committed in the context of armed conflict without regard to whether that conflict was international or internal.<sup>133</sup> The decision reasoned that the Statute was a self-contained regime for the application of customary international law and did not require the importation of all the conditions of applicability set out in the Geneva Conventions themselves.<sup>134</sup>

On interlocutory appeal, the Appeals Chamber reversed the Trial Chamber’s determination on this matter and, stressing the need to stay within the confines of the existing law, concluded that acts could be classified as grave breaches under Article 2 only if they were committed in the context of international armed conflict.<sup>135</sup> In ultimately deciding this case on the merits, the Trial Chamber was bound by the Appeals

<sup>131</sup> Geneva Conventions (I)–(IV), *supra* notes 6 & 15, art. 2. The full text of Article 2 common to the four Geneva Conventions of 1949 (“Common Article 2”) reads as follows:

Art. 2. In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

*Id.* art. 2.

<sup>132</sup> Prosecutor v. Tadic, Case No. IT-94-I-T, Motion of the Defence on the Jurisdiction of the Tribunal (T.Ch.II June 23, 1995).

<sup>133</sup> “[T]he element of internationality forms no jurisdictional criterion of the offen[s]es created by Article 2 of the Statute of the International Tribunal.” Prosecutor v. Tadic, Case No. IT-94-I-T, Decision on the Defence Motion on Jurisdiction, para. 53 (T.Ch.II Aug. 10, 1995).

<sup>134</sup> The Trial Chamber stated:

[T]here is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention to international conflicts. As stated, Article 2 of the Statute is on its face, self-contained, save in relation to the definition of protected persons and things.

*Id.* para. 51.

<sup>135</sup> “[T]he Appeals Chamber must conclude that, in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts.” Prosecutor v. Tadic, Case No. IT-94-I-AR72, Appeals Decision on Jurisdiction, paras. 84, 91 (A.C. Aug. 19, 1995).

ruling to consider international armed conflict as an indispensable element of grave breaches. But it was left to the Trial Chamber, as the initial finder of fact, to decide whether the armed conflict in the Prijedor region was internal or international when Dusko Tadic allegedly committed his crimes.<sup>136</sup> Judge McDonald's dissent argues persuasively that based on its other factual findings in this case, the Trial Chamber should have concluded that Tadic committed his crimes in the context of international armed conflict. But as that dissenting opinion notes, "the majority makes no clear finding regarding the character of the armed conflict after 19 May 1992."<sup>137</sup> Instead, the majority decision on the applicability of Article 2 of the Statute turns on the related issue of whether the victims can be classified as "protected persons" under the Geneva Convention.<sup>138</sup>

Although the majority opinion includes no clear finding on the nature of the armed conflict, it seems implicitly to find that the conflict was internal and not international. The opinion's background factual findings repeatedly stress a timeline based on the Yugoslav National Army's (JNA's) formal withdrawal from Bosnia and Herzegovina on May 19, 1992,<sup>139</sup> as if to suggest that the armed conflict in that country was presumptively internal after that date. It is tragically simplistic to draw a bright chronological line between periods of international and internal armed conflict in Bosnia and Herzegovina so suddenly after the formal withdrawal of the Yugoslav Army. The Trial Chamber's own findings of fact provide ample evidence that the context of armed conflict in which Tadic committed his crimes was still effectively internationalized despite the Army's withdrawal.

The following facts established by decision of the Trial Chamber and the Appeals Chamber constitute a compelling case that Tadic committed his crimes, in the context of international armed conflict. The Trial Chamber found that during the early 1990s the JNA gradually transformed itself from a multiethnic national army of the Federal Republic of Yugoslavia (FRY)<sup>140</sup> with just over 35% Serbs among its conscripts into a 90% Serb army and an instrument of Serb nationalist policy.<sup>141</sup> After the secession of the non-Serb Republics from Yugoslavia in 1991 and 1992, the JNA was no longer functioning as a "national" army but remained in substantial force in Bosnia and Herzegovina. It worked to retain as much Serb control as possible in Bosnia and Herzegovina while

<sup>136</sup> In a separate proceeding, the Trial Chamber noted that "[t]he Appeals Chamber's decision in the *Tadic* case did not . . . set out the quantum of involvement by a third state that is needed to convert a domestic conflict into an international one." *Prosecutor v. Rajic*, Case No. IT-95-12-R61, Review of the Indictment Pursuant to Rule 61, para. 12 (T.Ch.II Sept. 13, 1996).

<sup>137</sup> *Prosecutor v. Tadic*, Case No. IT-94-I-T, Dissenting Opinion of Judge McDonald, para. 5 (T.Ch.II May 7, 1997).

<sup>138</sup> *See id.*, Opinion and Judgment, para. 608.

<sup>139</sup> *See id.* paras. 115, 125, 118, 127, 139-53, 155, 168, 190.

<sup>140</sup> *See id.* para. 104.

<sup>141</sup> *See id.* para. 109.



appearing to comply with international demands that the JNA withdraw from Bosnia and Herzegovina.<sup>142</sup>

Serbia's solution to this political dilemma was to transfer all the Bosnian Serb soldiers in the JNA to Bosnia where they would become the army of the Republika Srpska within Bosnia and Herzegovina, known as the VRS. The "new" VRS would remain under command of former JNA officers who were still paid and supplied by the FRY (Serbia and Montenegro) in Belgrade.<sup>143</sup>

The JNA formally withdrew from Bosnia and Herzegovina on May 19, 1992,<sup>144</sup> but active elements of the old JNA continued to work with the new Bosnian Serb VRS.<sup>145</sup> With continuing support from Yugoslavia, the VRS took over the JNA task of promoting and protecting the interests of the Serb nation in Bosnia and Herzegovina.<sup>146</sup> Even as this formal transition was taking place, the JNA itself remained directly involved. It continued to operate in Bosnia and Herzegovina, including the region of Prijedor, after its independence was recognized by the European Community on April 7, 1992.<sup>147</sup> On April 30, 1992, JNA soldiers "wearing a variety of uniforms, occupied all the prominent institutions" of the city.<sup>148</sup>

From this background, Dusko Tadic emerged. He was found by the Trial Chamber to have participated in persecutions that began less than a month after the formal withdrawal of the JNA on May 19, 1992. He was convicted of killings, beatings, and the forced transfer of a number of seized civilians in the village of Kozarac between May 24–27, 1992.<sup>149</sup> The Appeals Chamber had already ruled that the involvement of the JNA in Bosnia and Herzegovina before May 19 rendered the armed conflict in that country an international armed conflict<sup>150</sup> and that whether the continued fighting between Bosnian Serb and Muslim forces remained an international armed conflict depended upon whether direct involvement of the FRY could be proven.<sup>151</sup> In light of the factual

<sup>142</sup> See *id.* para. 113.

<sup>143</sup> See *id.* paras. 114–15.

<sup>144</sup> See *id.* para. 115.

<sup>145</sup> See *id.* para. 118.

<sup>146</sup> See *id.* para. 116.

<sup>147</sup> See *id.* para. 125.

<sup>148</sup> *Id.* para. 137.

<sup>149</sup> *Id.* para. 714, Indictment, para. 4.1.

<sup>150</sup> "The conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army ('JNA') in hostilities in Croatia, as well as in Bosnia-Herzegovina at least until its formal withdrawal on 19 May 1992." Prosecutor v. Tadic, Case No. IT-94-I-AR72, Appeals Decision on Jurisdiction, para. 72 (A.C. Aug. 19, 1995).

<sup>151</sup> The Appeals Chamber stated:

To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven).

findings cited above, continuing direct involvement appears to have been well established at trial. However, in determining the legal consequences of that involvement the majority of the Trial Chamber applied a strict test of agency.<sup>152</sup> Based on this test, they concluded that the grave breaches provisions of the ICTY Statute were inapplicable because Tadic's civilian victims did not qualify as "protected persons" under the Geneva Convention (IV).

*B. "Protected Person" Status Under the Geneva Convention (IV)*

The factual findings of the ICTY relating directly to the internationality of the armed conflict are also relevant in determining the nationality of the parties to the armed conflict in Bosnia and Herzegovina and the status of the victims as "protected persons." In deciding the case on the grounds of the latter issue,<sup>153</sup> without explicitly expressing a conclusion as to the nature of the conflict as internal or international, the majority opinion underlines the close relationship between these two issues.

The distinction between these two elements, however, is a real one. Under Article 2 of the ICTY Statute, the grave breaches provisions of the Geneva Convention (IV) will not necessarily apply to crimes committed against civilians in Bosnia and Herzegovina even if the armed conflict there was indeed an international one. This is because such Bosnian victims, due to their nationality (which here refers to citizenship in the legal sense and not nationality in the ethnic sense) may not qualify as protected persons. The definition of civilian "protected persons" is quite narrow, and complicates the application of the grave breaches provisions to any case where Bosnians of one ethnic or religious group are accused of illegal acts against other Bosnians. That definition, as given in the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949), is as follows: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."<sup>154</sup> Thus, Bosnian victims can qualify as "protected persons" for purposes of the regime applicable to grave breaches against civilians only if they are "in the hands of a Party to the conflict . . . of which they are not nationals." The Commentary to the Fourth Geneva Convention makes it clear that the expression "in the hands of" "need not necessarily be understood in the physical sense; it simply means that the person is in territory which is under the control of the Power in question."<sup>155</sup> It has been argued that the language in the Geneva Convention (IV) defining grave

*Id.* para. 72.

<sup>152</sup> The issue of agency will be discussed at greater length *infra* Part III.

<sup>153</sup> See *Prosecutor v. Tadic*, Case No. IT-94-I-T, Opinion and Judgment, para. 608 (T.Ch.II May 7, 1997); see also *supra* note 129.

<sup>154</sup> Geneva Convention (IV), *supra* note 6, art. 4, 75 U.N.T.S. at 290.

<sup>155</sup> *Id.* at 47 (Commentary to Geneva Convention (IV)).

breaches as acts "committed against persons or property protected by the present Convention" should not be read to incorporate only the narrowest definition of "protected persons."<sup>156</sup> However, both the *Tadic* Trial Chamber<sup>157</sup> and the Appeals Chamber rejected this view, with the latter holding that "the offences listed in Article 2 of the Statute can only be prosecuted when perpetrated against persons or property regarded as "protected" by the Geneva Conventions under the strict conditions set out by the Conventions themselves."<sup>158</sup> Under the provisions of the Geneva Convention (IV) criminal acts can only be characterized as "grave breaches" when the victims and perpetrators do not share the same nationality.

There is some question as to who qualifies as a "party to the conflict" under this definition. The narrower term "High Contracting Party,"<sup>159</sup> used elsewhere throughout the Geneva Conventions, is not used here, leaving open the possibility that this term might be applied to the Bosnian Serb forces or Bosnian Croat forces as well as to the Bosnian government's forces. The same broader phrase "party to the conflict" is used to refer to internal armed factions in Common Article 3 of the Geneva Conventions,<sup>160</sup> but that article, unlike the grave breaches provisions at issue here, is intended by its own terms to apply to internal armed conflict.

Despite the bitterness of the armed conflicts between Bosnian Serbs, Bosnian Muslims, and Bosnian Croats prior to the 1995 Dayton Accords, the nationality of all these groups has remained Bosnian. As long as this formal concept of nationality is considered by the International Tribunal to be controlling,<sup>161</sup> civilian victims of the interethnic conflict in Bosnia and Herzegovina can qualify as protected persons only if a foreign power

<sup>156</sup> The Geneva Convention (IV) states that "[g]rave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention." *Id.* art. 158, 75 U.N.T.S. at 388, (emphasis added). In interpreting this language Jordan Paust argues as follows:

The Convention states that any of the listed acts committed against persons "protected by the present Convention" are grave breaches of the Convention. This means persons protected anywhere in the present Convention or in any articles of the Convention. It does not utilize the more restrictive terminology of "protected persons[.]"

Jordan J. Paust, War Crimes Jurisdiction and Due Process: The Bangladesh Experience, 11 VAND. J. TRANSNAT'L L. 1, 28 n.101 (1978).

<sup>157</sup> Referring to Article 2 of the ICTY Statute, the Trial Chamber concluded that "[t]he Article has been so drafted to be self contained rather than referential, save for the identification of the victims of [the] enumerated acts; that identification and that alone involves going to the Conventions themselves for the definition of 'persons or property protected.'" *Prosecutor v. Tadic*, Case No. IT-94-I-T, Decision on the Defence Motion on Jurisdiction, para. 49 (T.Ch.II Aug. 10, 1995).

<sup>158</sup> *Prosecutor v. Tadic*, Case No. IT-94-I-AR72, Appeals Decision on Jurisdiction, para. 81 (A.C. Oct. 2, 1995).

<sup>159</sup> "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." Geneva Convention (IV), *supra* note 6, art. 1, 75 U.N.T.S. at 288.

<sup>160</sup> *See id.* art. 3 (common to all four of the Geneva Conventions of 1949).

<sup>161</sup> For a discussion of the possibility of applying a broader and more functional concept of nationality in international humanitarian law, see *infra* notes 221-37 and accompanying text.

such as the Former Republic of Yugoslavia (FRY) or Croatia is found to have been in control of one of the Bosnian parties. Such a finding could, in theory, transform the shared *nationality* of Bosnian Serbs and their Bosnian Muslim victims into a form of *internationality* that would qualify the latter as protected persons.

In the future the judges of the ICTY may take a more flexible approach to applying the concepts of relative nationality and international armed conflict as elements of grave breaches. The restrictive approach taken by the majority in the *Tadic* case handicaps the ICTY by effectively depriving it of the ability to convict for “grave breaches of the Geneva Conventions,” an especially serious and enforceable category of offense under international humanitarian law.<sup>162</sup> If followed it will leave the ICTY with an even narrower range of crimes within its jurisdiction than those available to the International Tribunal for Rwanda. From the outset, the situation in Rwanda was seen as an internal armed conflict.<sup>163</sup> Therefore, the Rwanda Tribunal’s Statute does not include “grave breaches of the Geneva Conventions” as crimes within its jurisdiction.<sup>164</sup> Unlike the ICTR, the ICTY was granted jurisdiction over grave breaches under Article 2 of its Statute, and it would be unfortunate if an unduly narrow application of that article were to neutralize this central aspect of its intended jurisdiction. Article 2 of the ICTY Statute will be ineffectual if such strict and outmoded notions of nationality are allowed to limit its applicability.

### C. *Establishing Grave Breaches Via the Principle of Agency*

If the Bosnian Serbs in control of the region where Tadic committed his crimes were acting as agents of the government of the FRY, then any Bosnian not recognized as a national by that government should be classified as a “protected person.” All of the judges in the Trial Chamber agreed on this much,<sup>165</sup> just as they agreed on the essential facts

<sup>162</sup> See *infra* text accompanying notes 199–245 for a discussion of the special importance of the grave breaches regime in international criminal law and the need to maintain its effectiveness.

<sup>163</sup> The Report of the Commission of Experts established to analyze evidence of grave violations of international humanitarian law committed in the territory of Rwanda notes:

The armed conflict between 6 April and 15 July 1994 qualifies as a non-international armed conflict. The use of armed force had been carried out within the territorial borders of Rwanda and did not involve the active participation of any other State. Third State involvement entailed peacemaking and humanitarian functions rather than belligerent action.

*Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935*, para. 108, U.N./Doc. S/1994/1405, 1994.

<sup>164</sup> The Statute of the International Criminal Tribunal for Rwanda names genocide (Article 2), crimes against humanity (Article 3), and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 4) as crimes within that institution’s jurisdiction. See ICTR Statute, *supra* note 105, 1602–04.

<sup>165</sup> Although the majority opinion did not find the Bosnian Serbs to have acted as agents of the FRY, it did accept the applicability of the principle of agency. That opinion notes:

The armed forces of the Republika Srpska, and the Republika Srpska as a whole, were, at least from 19 May 1992 onwards, legal entities distinct from the VJ and the Govern-

concerning the FRY's involvement in Bosnia and Herzegovina,<sup>166</sup> but they disagreed as to the test of agency to be applied to the facts.

The majority applied a test based on its reading of the decision by the International Court of Justice (ICJ) in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.)* ("the *Nicaragua* case").<sup>167</sup> The majority decision is quick to admit that both the facts in the *Nicaragua* case and the legal issue to be resolved, were quite different from those in the case before the Trial Chamber.<sup>168</sup> Nonetheless, it attempts to apply the same "particularly high threshold test"<sup>169</sup> which it purports to derive from that opinion. The test is one of "effective control."<sup>170</sup> Judge McDonald's dissenting opinion argues that

ment of the Federal Republic of Yugoslavia (Serbia and Montenegro). However, as a rule of customary international law, the acts of persons, groups or organizations may be imputed to a State where they act as de facto organs or agents of that State. One may speak of imputability as "the result of the intellectual operation necessary to bridge the gap between the delinquency of the organ or official, and the attribution of breach and liability to the State." In this case, the acts of the armed forces of the Republika Srpska, although nationals of the Republic of Bosnia and Herzegovina, after 19 May 1992 in relation to Opstina Prijedor may be imputed to the Federal Republic of Yugoslavia (Serbia and Montenegro) if those forces were acting as de facto organs or agents of that State for that purpose or more generally.

Prosecutor v. Tadic, Case No. IT-94-I-T, Opinion and Judgment, para. 584 (T.Ch.II May 7, 1997).

<sup>166</sup> See *supra* Part III.A (discussing the factual findings regarding international armed conflict).

<sup>167</sup> 1986 I.C.J. 14 (June 27), reprinted in 25 I.L.M. 1023 (1986).

<sup>168</sup> As the *Tadic* court observed:

[T]he facts of the *Nicaragua* case and this case are very different, and especially so in two important respects. First, the VRS was an occupying force, rather than just a raiding army. . . . Secondly, prior to the withdrawal of forces of the Federal Republic of Yugoslavia (Serbia and Montenegro) on or before 19 May 1992, Bosnian Serb troops served in the ranks of the JNA, and were transferred into the newly-formed VRS after that date.

Prosecutor v. Tadic, Case No. IT-94-I-T, Opinion and Judgment, paras. 586–87 (T.Ch.II May 7, 1997). The court went on to conclude:

Thus, unlike the *Nicaragua* case in which the court considered whether the *contra* forces had, over time, fallen into such a sufficient state of dependency and control vis-à-vis the United States that the acts of one could be imputed to another, the question for this Trial Chamber is whether, after 19 May 1992, the Federal Republic of Yugoslavia (Serbia and Montenegro), by its withdrawal from the territory of the Republic of Bosnia and Herzegovina and notwithstanding its continuing support for the VRS, had sufficiently distanced itself from the VRS so that those forces could not be regarded as de facto organs or agents of the VJ and hence of the Federal Republic of Yugoslavia (Serbia and Montenegro).

*Id.* para. 587.

<sup>169</sup> "In concluding that the United States had not exercised sufficient control 'in all fields as to justify treating the *contras* as acting on its behalf', [sic] the Court set a particularly high threshold test for determining the requisite degree of control on the part of the United States." *Id.* para. 585.

<sup>170</sup> *Id.* para. 595. The Trial Chamber stated:

It can be seen then that the JNA played a role of vital importance in the establishment, equipping, supplying, maintenance and staffing of the 1st Krajina Corps, as it did with other VRS units. However, that in itself is not enough; it is also necessary to show, as the Court required of Nicaragua in proving control by the United States over the *contras*, that the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) continued to exercise effective control over the operations of the VRS, after the transfers of men and matériel on or before 19 May 1992.

*Id.*

a. far less stringent test of “dependency and control” is appropriate.<sup>171</sup> After applying this test she concluded that the VRS acted as an agent of the FRY in relation to the events charged in the indictment.<sup>172</sup>

The “command and control” test of agency as applied in the *Nicaragua* case was designed to determine the issue of state responsibility for violations for international humanitarian law,<sup>173</sup> and in this sense it is entirely state-centric. This test is inappropriate for cases before the International Tribunal because state responsibility is entirely beside the point in determining the scope of individual criminal responsibility.<sup>174</sup> Moreover, the majority of the Trial Chamber misapplied principles from *Nicaragua* in a way that undermines the effectiveness of international humanitarian law both as the basis of individual criminal responsibility and as the basis of state responsibility. In his dissenting opinion in *Nicaragua*, Judge Ago, formerly the Special Rapporteur to the International Law Commission on State Responsibility, suggested that the attribution of state responsibility would indeed be appropriate where local forces have been specifically charged by a foreign power with carrying out illegal acts.<sup>175</sup> The majority conceded that VRS attacks in Bosnia and

<sup>171</sup> “[T]he appropriate test of agency from *Nicaragua* is one of ‘dependency and control’ and a showing of effective control is not required.” *Id.*, Dissenting Opinion of Judge McDonald, para. 4.

<sup>172</sup> “[T]he Federal Republic of Yugoslavia (Serbia and Montenegro) established what is essentially a puppet regime in the VRS, which was charged with the responsibility for executing the military operations of the Federal Republic of Yugoslavia (Serbia and Montenegro) in Bosnia and Herzegovina.” *Id.*, Dissenting Opinion of Judge McDonald, para. 3. The dissent further contended:

[T]he Trial Chamber should not import the *Nicaragua* requirement of effective control but should instead . . . disregard the formal criteria of the military structure. The key issue here is whether the VRS was indeed dependent on and controlled by the Federal Republic of Yugoslavia (Serbia and Montenegro). As noted above, the evidence is more than sufficient to make such a determination.

*Id.*

<sup>173</sup> In discussing the participation of the United States in supporting the *contras* in *Nicaragua*, the International Court of Justice noted that “[f]or this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.” *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986, I.C.J. 14, 65, para. 115 (June 27), *reprinted in* 25 I.L.M. 1023 (1986); *see also* *Prosecutor v. Tadic*, Case No. IT-94-I-T, Opinion and Judgment, paras. 585–86 (T.Ch.II May 7, 1997).

<sup>174</sup> Judge McDonald addressed this issue directly in her dissenting opinion:

In coming to its ultimate conclusion, the majority opinion fails to give appropriate weight to the unique circumstances the Trial Chamber is faced with given its position as an international criminal tribunal determining individual—as opposed to State—responsibility. This problem permeates the entire analysis, beginning with the manner in which the issue is initially framed as one of “imputability,” which the majority clearly notes relates to “delinquency” and the “attribution of breach and liability” to a State. A determination of imputability was appropriate in *Nicaragua*, where the moving party sought to determine fault and liability of a State for the acts of the *contras* as against the United States, but is not suitable here, where the issue of responsibility is solely for the purpose of identifying the occupying power.

*Prosecutor v. Tadic*, Case No. IT-94-I-T, Dissenting Opinion of Judge McDonald, para. 27 (T.Ch.II May 7, 1997).

<sup>175</sup> Judge Ago stated:

It would indeed be inconsistent with the principles governing the question to regard members of the *contra* forces as persons or groups acting in the name and on behalf of

Herzegovina commanded by non-Bosnian Serb officers could meet this test, but held that even this principle of responsibility was inapplicable unless the acts they were charged with carrying out "circumvented or overrode the authority of the [Bosnian] Corps Commander."<sup>176</sup> Judge McDonald's dissent aptly notes that "the standard the majority has created is even more demanding" than the high threshold test for agency applied by the ICJ in *Nicaragua*.<sup>177</sup> This standard is not required by established principles of agency, nor does it further any paramount interest of the State or of the international community as a whole. The added difficulty of meeting this test makes it much more difficult to prosecute for grave breaches.

The Tadic trial is the only full trial to be completed thus far by the International Tribunal, and the Trial Chamber's decision in that case is presently being appealed. It is too soon to determine, based on limited precedent, whether the International Tribunal will continue to apply Article 2 in such a restrictive way to complicated fact situations involving Bosnia and Herzegovina. Supplementing its trial jurisprudence, the ICTY has conducted a number of reviews of the indictment pursuant to Rule 61.<sup>178</sup> The rulings issued at the completion of those Rule 61

the United States of America . . . [except] in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or [to] carry out a particular task of some kind on behalf of the United States.

*Nicaragua*, 1986 I.C.J. at 18, para. 16 (separate opinion of Judge Ago).

<sup>176</sup> Prosecutor v. Tadic, Case No. IT-94-I-T, Opinion and Judgment, para. 601 (T.Ch.II May 7, 1997). The court noted:

[A]lthough they may be considered as instances in which, to paraphrase Judge Ago, "certain members of the VRS happened to have been specifically charged by Federal Republic of Yugoslavia (Serbia and Montenegro) authorities to commit a particular act, or to carry out a particular task of some kind," without evidence of orders having been received from Belgrade which circumvented or overrode the authority of the Corps Commander, those acts cannot be said to have been carried out "on behalf of" the Federal Republic of Yugoslavia (Serbia and Montenegro).

*Id.*

<sup>177</sup> *Id.*, Dissenting Opinion of Judge McDonald, para. 3.

<sup>178</sup> Rule 61, entitled "Procedure in Case of Failure to Execute a Warrant," provides for a special proceeding to be held with regard to an accused who has not been arrested and brought before the Tribunal within a reasonable time after being indicted. See ICTY Rules, *supra* note 51, Rule 61. The Tribunal's evaluation of the facts presented in the course of a Rule 61 proceeding results in neither a conclusive factual determination, nor a finding of guilt or innocence. As the Trial Chamber noted in the *Rajic* case:

A Rule 61 proceeding is not a trial *in absentia*. There is no finding of guilt in this proceeding. The only determination the Trial Chamber makes is whether there are reasonable grounds for believing that the accused committed the crimes charged in the indictment. As part of this determination, the Chamber considers whether the acts with which the accused is charged, if proven beyond a reasonable doubt at trial, are crimes falling within its subject-matter jurisdiction and ensures that the charges against the accused are well founded in fact. . . . The only consequences of the proceeding are the public airing of the evidence against the accused and the possible issuance of an international arrest warrant, thereby enhancing the likelihood of the arrest of the accused and enabling the International Tribunal to discharge its mandate instead of being rendered ineffective by the non-compliance of States. Thus the procedure furthers the purposes for which the International Tribunal was established.

Prosecutor v. Rajic, Case No. IT-95-12-R61, Review of the Indictment Pursuant to Rule 61, para. 3 (T.Ch.II Sept. 13, 1996).

hearings provide some further indication of how Article 2 of the ICTY Statute may be applied in future trials. These rulings are of limited precedential value, however, both because they are the result of an *ex parte* proceeding<sup>179</sup> and because they are nonbinding (except for permitting the issuance of an international arrest warrant).<sup>180</sup>

The Trial Chamber took a more practical approach to the requirements of Article 2 of the Statute in its ruling after the Rule 61 hearing in the Ivica Rajic case. Rajic is a Bosnian Croat accused of crimes against Bosnian civilian residents of the village of Stupni Do.<sup>181</sup> After hearing the evidence presented by the prosecutor in the Rule 61 hearings, the Trial Chamber made three key determinations. It found that the involvement of the Croatian Army in supporting Bosnian Croats against the Bosnian Government was sufficient to transform the conflict between them into an international one,<sup>182</sup> that the Bosnian Croats involved were acting as agents of Croatia,<sup>183</sup> and that Croatia was effectively in control of the territory where the alleged acts occurred.<sup>184</sup> On this basis, the judges concluded<sup>185</sup> that they had subject-matter jurisdiction over several of the charges against Rajic under Article 2 of the ICTY Statute.<sup>186</sup> These findings, if confirmed at trial, would allow the Bosnian Muslim victims of

<sup>179</sup> The ICTY has rejected requests to participate in Rule 61 hearings made by attorneys representing those indicted but refusing to surrender to the jurisdiction of the Tribunal. Although these attorneys may be granted observer status at Rule 61 hearings, these hearings, unlike trials before the ICTY, are *ex parte* and not adversarial. See *Prosecutor v. Karadzic & Mladic*, Case Nos. IT-95-5-R61 and IT-95-18-R61, Review of the Indictment Pursuant to Rule 61, para. 4 (T.Ch.I July 11, 1996).

<sup>180</sup> See *Prosecutor v. Rajic*, Case No. IT-95-12-R61, Review of the Indictment Pursuant to Rule 61, para. 3 (T.Ch.II Sept. 13, 1996).

<sup>181</sup> See *Prosecutor v. Rajic*, Case No. IT-95-12, Indictment, paras. 12–13, (T.Ch.II Aug. 23, 1995).

<sup>182</sup> See *id.* para. 13. In its review, the court stated:

The Chamber finds that, for purposes of the application of the grave breaches provisions of Geneva Convention IV, the significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnian Government on the territory of the latter was sufficient to convert the domestic conflict between Bosnian Croats and the Bosnian Government into an international one.

*Prosecutor v. Rajic*, Case No. IT-95-12-R61, Review of the Indictment Pursuant to Rule 61, para. 13 (T.Ch.II Sept. 13, 1996).

<sup>183</sup> The court held:

The evidence submitted in this case establishes reasonable grounds for believing that the Bosnian Croats were agents of Croatia in clashes with the Bosnian Government in central and southern Bosnia from the autumn of 1992 to the spring of 1993. It appears that Croatia, in addition to assisting the Bosnian Croats in much the same manner in which the United States backed the *contras* in *Nicaragua*, inserted its own armed forces into the conflict on the territory of Bosnia and exercised a high degree of control over both the military and the political institutions of [the] Bosnian Croats.

*Id.* para. 13.

<sup>184</sup> See *id.* para. 26.

<sup>185</sup> The judges were careful to qualify the significance of their findings in a Rule 61 proceeding by noting that “the instant proceedings are preliminary in nature and may be revisited at trial.” *Id.* para. 25.

<sup>186</sup> See *id.* para. 43.



Rajic, a Bosnian Croat, to qualify as protected persons and would also satisfy the requirement of international armed conflict.

The Appeals Chamber, in an earlier ruling, suggested that an “absurd outcome” could result from a ruling that the Bosnian Serbs were acting as agents of the former Yugoslavia.<sup>187</sup> That opinion reasoned that if Bosnian Serb atrocities against Bosnian Muslims were punishable as grave breaches while Bosnian Muslim atrocities against Bosnian Serbs were not, the latter would be at a “substantial disadvantage” *vis-à-vis* the former.<sup>188</sup> One fallacy in this argument is the implicit assumption that international humanitarian law must apply with perfect equality to the actions of Bosnian Serbs against Bosnian Muslims and vice versa. The idea of this symmetry is logically appealing, but factual circumstances may compel a different result. Many Bosnian Serbs worked in cooperation with Serbia, a “foreign” power, to rid parts of Bosnia and Herzegovina of non-Serbs. Bosnian Muslims did not work for or with such a foreign patron. If Bosnian Serbs acted as agents of Serbia in their acts against Bosnian Muslims then they may be subject to prosecution for grave breaches even if the same actions of Bosnian Muslims against them would not qualify as such. One cannot argue at the same time for a formalistic application of the law and for rejecting the legal consequences of that formalism. If, as proposed in this Article, the Tribunal were to apply a more functional concept of nationality for purposes of international humanitarian law, the grave breaches regime would apply without entailing such an asymmetrical result.

<sup>187</sup> The Appeals Chamber formulated a *reductio ad absurdum* argument in the following terms:

If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities of Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as “grave breaches,” because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as “protected persons” under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as “grave breaches,” because such civilians would be “protected persons” under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument advanced by the Prosecutor before the Appeals Chamber.

Prosecutor v. Tadic, Case No. IT-94-I-AR72, Appeals Decision on Jurisdiction, para. 76 (A.C. Oct. 2, 1995).

<sup>188</sup> See *Id.*

## V. MAINTAINING THE RELEVANCE OF THE GRAVE BREACHES REGIME

The ultimate significance of nationality and internationality in the grander scheme of international humanitarian law depends upon the role of the grave breaches regime within the logical structure of that law. Only after considering the jurisdictional prerequisites of other types of crimes under international humanitarian law can the full importance of the grave breaches regime be appreciated. Although there are a number of alternative crimes under international humanitarian law for which offenders may be prosecuted, none of these can fully substitute for grave breaches. The Geneva Convention (IV) creates a special enforcement regime that requires states to cooperate in the enforcement of grave breaches, and the extension of that regime to the broadest possible range of wartime situations would reinforce the relevance and effectiveness of international humanitarian law as a whole. This Part considers the arguments for and against extending the grave breaches regime. It then proposes that the relevance of that regime should be maintained by applying a new and more flexible concept of nationality for the purposes of international humanitarian law.

A. *Alternatives to Prosecution for Grave Breaches*

The Trial Chamber's formalistic approach to issues of nationality and internationality did not preclude it from convicting Dusko Tadic of serious international crimes. Under its Statute, the ICTY has jurisdiction over three categories of crimes under international humanitarian law in addition to grave breaches.<sup>189</sup> These other crimes do not require that the nationality of the victim or the internationality of the surrounding armed conflict be established as a jurisdictional prerequisite.

Acts such as murder, torture, hostage taking, willfully causing great suffering or serious bodily or mental harm, rape, unlawful confinement, judgment and deprivation of rights without fair trial, and deportation are used all too commonly by parties to armed conflicts as illegal weapons of war. When this occurs, the crime committed may variously be characterized as a grave breach, a violation of the laws and customs of war, a crime against humanity, or an act of genocide, depending upon whether the particular jurisdictional prerequisites of each of these crimes has been met.

Prohibited acts can be classified as genocide under Article 4 of the ICTY Statute only if committed against a national, ethnic, racial, or religious group and accompanied by the specific intent to destroy that group in whole or in part.<sup>190</sup> The latter element may be especially difficult to

<sup>189</sup> See ICTY Statute, *supra* note 1, arts. 3–5.

<sup>190</sup> The ICTY Statute defines genocide in language borrowed without change from the Genocide Convention, *supra* note 47, art. 2:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

prove, which is one reason why the indictments of the ICTY have rarely charged genocide.

Crimes against humanity provide another possible ground for prosecution under Article 5 of the ICTY Statute,<sup>191</sup> but the International Tribunal must meet the burden of establishing several complex and unique elements before it can impose individual criminal responsibility for these crimes. According to the *Tadic* Trial Chamber, crimes against humanity must be directed against a civilian population in a widespread or systematic manner as part of a broader policy to commit such acts, and they must be committed by someone with knowledge of the broader circumstances of this policy who is acting with discriminatory intent.<sup>192</sup>

Article 3 of the ICTY Statute provides an additional alternative by broadly giving the Tribunal the power to prosecute for violations of the laws and customs of war.<sup>193</sup> Although the article lists some possible violations, that list is specifically stated to be illustrative and not exhaustive. The Appeals Chamber has held that this section should be interpreted so as to cover any serious offense against international humanitarian law that does not qualify as a "grave breach" under Article 2, or as genocide

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

ICTY Statute, *supra* note 1, art. 4.

<sup>191</sup> The ICTY Statute defines crimes against humanity as the following crimes, when committed "in armed conflict, whether international or internal in character, and directed against any civilian population": murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; and "other inhumane acts." ICTY Statute, *supra* note 1, art. 5.

<sup>192</sup> The *Tadic* decision identifies the following as the elements of crimes against humanity:

The requirements for crimes against humanity under the Statute are, apart from the existence of an armed conflict, that the acts be taken against a civilian population on a widespread or systematic basis in furtherance of a policy to commit these acts and that the perpetrator has knowledge of the wider context in which his act occurs. Additionally, because of the interpretation of Article 5 proffered by the Secretary-General as well as several members of the Security Council, the Trial Chamber has incorporated the additional element that the act must be taken on discriminatory grounds.

Prosecutor v. *Tadic*, Case No. IT-94-I-T, Opinion and Judgment, para. 716 (T.Ch.II May 7, 1997).

<sup>193</sup> Article 3 of the ICTY Statute gives the International Tribunal the power "to prosecute persons violating the laws or customs of war." ICTY Statute, *supra* note 1, art. 3. Such violations include, but are not limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity, and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

ICTY Statute, *supra* note 1, art. 3.

or crimes against humanity under Articles 4 and 5 of the Statute, respectively.<sup>194</sup> The range of acts that can qualify as violations of the laws and customs of war under Article 3 of the ICTY Statute is therefore quite broad, encompassing any number of nonenumerated violations.

The ICTY Appeals Chamber has confirmed that atrocities against civilians can constitute violations of the laws and customs of war if they contravene the prohibitions of Common Article 3 of the four Geneva Conventions of 1949.<sup>195</sup> This article is the only part of those Conventions that explicitly applies to armed conflict of an internal character, and it sets out the minimum standard of protection applicable to non-combatants in the context of any armed conflict.<sup>196</sup> The *Tadic* Trial Chamber identified three elements of any violation of Common Article 3. Two of these, however, are also applicable to all crimes within the jurisdiction of the ICTY: the basic requirement of armed conflict and the logical requirement that there must be a nexus between the armed conflict and the acts committed.<sup>197</sup> The only jurisdictional requirement unique to these violations is that the victims, in order to be protected under Common Article 3, must not have been taking active part in the

<sup>194</sup> Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeals Decision on Jurisdiction, para. 91 (A.C. Oct. 2, 1995).

<sup>195</sup> See *id.* paras. 128–36.

<sup>196</sup> Common Article 3 reads as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
  - (b) taking of hostages;
  - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
  - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Geneva Convention (IV), *supra* note 6, art. 3 (common to all four of the Geneva Conventions of 1949).

<sup>197</sup> See Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, para. 614 (T.Ch.II May 7, 1997).

hostilities.<sup>198</sup> The lack of onerous jurisdictional prerequisites makes this the easiest to prosecute of all violations of international humanitarian law. The following table restates the essential jurisdictional prerequisites of each of the four categories of crimes that can be prosecuted by the ICTY.

<b>TABLE B</b>	
<b>Jurisdictional Prerequisites Distinguishing the Different Categories of Crimes Under International Humanitarian Law</b> (additional requirements to the basic criminal act)	
<b>I. Grave Breaches of the Geneva Convention (IV) (ICTY Statute Article 2)</b>	
• Must be committed in the context of an international armed conflict	
• Must be committed against civilian victims in the hands of a party to the conflict or Occupying Power of which they are not nationals	
<b>II. Violations of the Laws and Customs of War (and more specifically of Common Article 3 of the Geneva Conventions) (ICTY Statute Article 3)</b>	
• Must be committed against those taking no active part in the hostilities (noncombatants)	
<b>III. Genocide (ICTY Statute Article 4)</b>	
• Must be committed against a national, ethnic, racial, or religious group	
• Must be accompanied by the specific intent to destroy that group in whole or in part	
<b>IV. Crimes Against Humanity (ICTY Statute Article 5)</b>	
• Must be directed against a civilian population in a widespread or systematic manner	
• Must be committed as part of a broader policy to commit such acts	
• Must also be committed by someone with knowledge of the broader circumstances of this criminal policy	
• Must be committed with discriminatory intent	

#### *A. The Importance of the Grave Breaches Regime*

A single illegal act, such as the murder of a group of civilians, could potentially qualify as a grave breach of the Geneva Conventions, a crime

<sup>198</sup> See *id.* para. 615. The court stated:

Whereas the concept of "protected person" under the Geneva Conventions is defined positively, the class of persons protected by the operation of Common Article 3 is defined negatively. For that reason, the test the Trial Chamber has applied is to ask whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed. If the answer to that question is negative, the victim will enjoy the protection of the proscriptions contained in Common Article 3.

*Id.*; see also Geneva Convention (IV), *supra* note 6, art. 3 (common to all four of the Geneva Conventions of 1949). By its terms, Common Article 3 protects "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause." *Id.*

against humanity, a violation of the laws and customs of war, or as genocide. Thus, Tadic could be found guilty on several counts of violations of the laws and customs of war as well as crimes against humanity even though the grave breaches provisions of the ICTY Statute were held to be inapplicable to the same criminal acts. However, the availability of such alternative charges under the ICTY Statute can only partially compensate for failure to apply the grave breaches regime. This is due to three factors: difficulties in proving the elements of some alternative categories of crimes, the relatively weak normative status of others, and the lack of an international enforcement regime applicable to most of them.

Two of the three crime categories other than grave breaches require proof of special elements that limit the scope of their application. Unless there is proof of widespread or systematic acts against a group based on race, sex, language, or religion, it will be impossible to convict for crimes against humanity.<sup>199</sup> Similarly, without proof that the accused had the specific intent to destroy a racial, ethnic, or religious group in whole or in part, it will be impossible to convict for genocide.<sup>200</sup> Potentially, then, grave breaches are a much more broadly applicable category of crime than either crimes against humanity or genocide. The principal obstacle to this broader application, of course, is the need to establish both the context of an *international* armed conflict and the status of the victims as "protected persons." While it proved to be easier, in the *Tadic* case, to establish the elements of crimes against humanity than those for grave breaches, in other cases the opposite may be true.

Violations of the laws and customs of war are certainly the easiest to prove of all the crimes within the jurisdiction of the ICTY, since they are not subject to any of the requirements mentioned above. There is no need to prove widespread or systematic action against a group, no need to prove specific intent to eliminate a group, and no need to establish facts concerning the international nature of the conflict or the nationality of any victim or party.<sup>201</sup> But the ability to convict for these violations cannot fully substitute for the grave breaches regime established by the 1949 Geneva Conventions. This is true both because grave breaches have a superior normative status as crimes under international humanitarian law than do violations of the laws and customs of war,<sup>202</sup> and because the latter are not subject to the same international enforcement regime applicable to grave breaches.

After cautiously limiting itself to a narrow technical interpretation of Article 2 of the Statute on grave breaches, the International Tribunal attempted to fill the resulting normative gap through a broad

<sup>199</sup> See *supra* notes 191–92.

<sup>200</sup> See *supra* note 190.

<sup>201</sup> See *supra* note 193.

<sup>202</sup> See *supra* notes 77–80 and accompanying text.

interpretation of Article 3 on the laws and customs of war.<sup>203</sup> In the indictments of the ICTY, the charge of violations of the laws and customs of war usually refers to actions against noncombatants in violation of Common Article 3 of the 1949 Geneva Conventions.<sup>204</sup> The ICTY has ruled, quite properly, that violations of Common Article 3 can be prosecuted as violations of the laws and customs of war under the ICTY Statute,<sup>205</sup> but the Statute does not explicitly grant the ICTY jurisdiction to prosecute for violations of Common Article 3. It is only the decisions of the ICTY<sup>206</sup> that have conclusively established that Article 3 of the Statute applies to these violations.<sup>207</sup>

Even without referring to the ICTY Statute it is evident that grave breaches constitute a much more potent and universally recognized category of international crime than do the violations of Common Article 3. The language on grave breaches in the four Geneva Conventions of 1949 defines a special class of the most serious violations of those conventions.<sup>208</sup> Common Article 3 of those same four conventions prohibits certain acts against noncombatants, but fails to classify these violations as grave breaches. Article 2 of the ICTY Statute specifically identifies "grave breaches" as crimes subject to prosecution by the ICTY, whereas violations of Common Article 3, as mentioned above, are not explicitly referred to in that Statute. Thus grave breaches are granted a higher degree of status and recognition under both the Geneva Conventions themselves and the ICTY Statute.

Grave breaches are not just a list of crimes derived from the Geneva Conventions of 1949. Those treaties also establish a special regime of international criminal law for the punishment of grave breaches.<sup>209</sup> The function of this regime is to introduce procedural obligations for the

<sup>203</sup> "Article 3 thus confers on the International Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Article 2, 4 or 5." Prosecutor v. Tadic, Case No. IT-94-I-AR72, Appeals Decision on Jurisdiction, para. 91 (A.C. Oct. 2, 1995).

<sup>204</sup> See *supra* note 196 and accompanying text.

<sup>205</sup> See Prosecutor v. Tadic, Case No. IT-94-I-AR72, Appeals Decision on Jurisdiction, paras. 128-36 (A.C. Oct. 2, 1995); Prosecutor v. Tadic, Case No. IT-94-I-T, Opinion and Judgment, paras. 610-17 (T.Ch.II May 7, 1997).

<sup>206</sup> See, e.g., Prosecutor v. Tadic, Case No. IT-94-I-AR72, Appeals Decision on Jurisdiction, para. 91 (A.C. Oct. 2, 1995).

<sup>207</sup> The novelty of attaching individual criminal responsibility to violations of Common Article 3 has raised the issue of *nullum crimen sine lege* with regard to these crimes. See *supra* notes 72-85 and accompanying text.

<sup>208</sup> The acts proscribed as grave breaches include wilful killing, torture, unlawful deportation or transfer of protected civilians, wilfully depriving a person of the rights of fair and regular trial, and the taking of hostages. See *supra* note 46.

<sup>209</sup> The appeals court observed:

The grave breaches system of the Geneva Conventions establishes a twofold system: [T]here is on the one hand an enumeration of offences that are regarded so serious as to constitute "grave breaches"; closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all Contracting States to search for and try or extradite persons allegedly responsible for "grave breaches."

Prosecutor v. Tadic, Case No. IT-94-I-AR72, Appeals Decision on Jurisdiction, para. 80 (A.C. Oct. 2, 1995).

prosecution of grave breaches by all states party to those conventions. This is accomplished by establishing universal jurisdiction over these crimes and by requiring member states to prosecute or extradite alleged perpetrators within their jurisdiction.<sup>210</sup> It is only with regard to these "grave breaches" that states bind themselves to participate in enforcing the kind of individual criminal responsibility imposed by the International Tribunal. A similar enforcement regime applies to the crime of genocide,<sup>211</sup> but since genocide, as discussed above, requires proof of the specific intent to eliminate a group in whole or in part, the grave breaches regime is the only broadly applicable regime of enforcement in international humanitarian law.<sup>212</sup>

<sup>210</sup> This regime is set out in the Geneva Convention (IV) in the following terms:

The High Contracting Parties *undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.*

Each High Contracting Party shall be under the *obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.* It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

Geneva Convention (IV), *supra* note 6, art. 146 (emphasis added). The Convention also states:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

*Id.* art. 147. Article 148 states: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article." *Id.* art. 148 (emphasis added).

<sup>211</sup> The Genocide Convention establishes an international enforcement regime in the following terms:

#### Article V.

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of Genocide or any of the other acts enumerated in Article III.

#### Article VI.

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

#### Article VII.

Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition.



The grave breaches regime of the 1949 Geneva Conventions, the heart of the nexus between international humanitarian law and international criminal law, is deflated by the requirements of nationality and of internationality as presently interpreted by the ICTY. The purposes of international humanitarian law will best be served if this special regime can be applied as widely as possible to the proscribed acts listed in Article 2 of the Statute. From a humanitarian standpoint, committing any of these acts<sup>213</sup> should be seen as equally heinous regardless of the nationality of those concerned or the internationality of the conflict.

*B. Arguments Against Extension of the Grave Breaches Regime*

Humanitarian considerations aside, a cogent if narrowly positivistic legal argument can be made against extending the grave breaches regime of the Geneva Conventions of 1949. The very value of the grave breaches regime is that it creates many obligations for the states party to the four Geneva Conventions of 1949. By becoming parties to those treaties, states have agreed to criminalize all such grave breaches under their domestic law, to search for those alleged to have committed grave breaches, and either to try them for these crimes or to extradite them to another member state that has made out a *prima facie* case against them.<sup>214</sup>

The grave breaches provisions of the Geneva Conventions create a unique and universal multilateral regime of enforcement. To extend the obligations of states under this regime to crimes committed in the context of internal armed conflict would increase the protections of international humanitarian law at the expense of state sovereignty, and would do so without the consent of states. In short, one argument against the extension of the grave breaches regime is that such an extension has not been agreed to by states, and would compromise their sovereignty.

In ruling that Article 2 on grave breaches applied only to international armed conflict, the Appeals Chamber was essentially following the classic rule that restrictions upon the sovereignty of states are not to be

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Genocide Convention, *supra* note 47, arts. 5–7.

<sup>212</sup> The differing scope of the applicability of these two categories of crimes is evident from the indictments of the ICTY. The first 12 indictments of the ICTY allege 144 counts of grave breaches and only nine counts of genocide. See Table A and *supra* note 98.

<sup>213</sup> The acts that can qualify as grave breaches under Article 2 of the ICTY Statute are the following: wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a civilian to serve in the forces of a hostile power; wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement of a civilian; and taking civilians as hostages. See ICTY Statute, *supra* note 1, art. 2.

<sup>214</sup> See Geneva Convention (IV), *supra* note 6, art. 146.

presumed.<sup>215</sup> The judges reasoned that when parties to the Geneva Conventions agreed to a strong regime for the enforcement of grave breaches, they did not consent to the application of that regime to crimes committed in the context of internal armed conflict on their territory.<sup>216</sup> This, the appeals judges suggested, would be too great an intrusion upon the sovereignty of states.<sup>217</sup>

However, both the concept and value of state sovereignty, especially in relation to the concerns of world order, have radically shifted in recent years. The Appeals Chamber opened the door to a broader application of the grave breaches regime in the future by noting what it referred to as the recent trend to blur the distinction between internal and international armed conflict.<sup>218</sup> It should be recognized that this trend is not just a matter of sloppy legal analysis, but rather reflects the ascendancy of international humanitarian concerns in the hierarchy of international norms. The sovereignty of states remains an important international value, but the prerogatives it entails have been limited and redefined to accommodate the newly recognized values of international human rights. In this day and age, insistence upon a traditional concept of state sovereignty is anachronistic,<sup>219</sup> especially in a humanitarian context. Viewed from this perspective, a modest extension of the grave breaches regime can indeed be justified.

While it may be difficult to establish that Bosnian victims of a different Bosnian faction qualify as protected persons under the strict terms of the Geneva Convention (IV), it is by no means impossible for the prosecution to make that case. As discussed above, the status of these victims as protected persons can be established if another country directly controlled the areas in question, e.g., through their own troops and officers, even if disguised as troops of a Bosnian faction or group; or if, as discussed above and acknowledged by the Trial Chamber's decision,<sup>220</sup> it controlled the areas in question indirectly through local military and/or political groups acting as their agents. One further possibility, which so

<sup>215</sup> As the Permanent Court of International Justice noted in the *Lotus* case, restrictions upon the sovereignty of states are not to be presumed. See S.S. *Lotus*, (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

<sup>216</sup> The judge stated:

The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on state sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other states jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts—at least, not the mandatory universal jurisdiction involved in the grave breaches system.

Prosecutor v. Tadic, Case No. IT-94-I-AR72, Appeals Decision on Jurisdiction, para. 80 (A.C. Oct. 2, 1995).

<sup>217</sup> See *id.*

<sup>218</sup> See *id.* para. 85.

<sup>219</sup> See Reisman, *supra* note 44, at 866, 873.

<sup>220</sup> See *supra* notes 164–76.

far has not been addressed or endorsed by the judges of the ICTY, is the application of a special concept of effective or functional nationality for purposes of international humanitarian law. This last possibility is discussed in the following Subpart.

### C. *Redefining Nationality*

#### 1. *Applying a Broader and More Functional View of Nationality*

Under the terms of the Geneva Convention (IV), grave breaches can only be committed against civilians who are “in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”<sup>221</sup> What concept of nationality should be applied in this context? The majority of the *Tadic* Trial Chamber took a strict approach. The court’s Opinion and Judgment seems to assume<sup>222</sup> that the parties to the armed conflict in Bosnia and Herzegovina and all the nominally Bosnian victims shared a common Bosnian nationality.

An alternative approach, based on notions of effective and functional nationality, is both possible and justifiable. The strategic aim of the Republika Srpska was to create an ethnically pure Serbian state.<sup>223</sup> It is undisputed that the rulers of this de facto regime did not generally consider Muslims or Croats to be nationals of their state. Under a functional approach to nationality, these Bosnian Muslim and Bosnian Croat civilian victims should qualify as protected persons under the Geneva Convention (IV). A functional approach would ensure the applicability of the Geneva Convention (IV) to situations where civilian victims find themselves in the hands of a party to armed conflict to whom they are not effectively linked by nationality.

<sup>221</sup> Geneva Convention (IV), *supra* note 6, art. 4.

<sup>222</sup> The Trial Chamber’s Opinion and Judgment does not discuss this issue explicitly except to conclude as follows:

The Trial Chamber is, by majority with the Presiding Judge dissenting, of the view that, on the evidence presented to it, after 19 May 1992 the armed forces of the Republika Srpska could not be considered as de facto organs or agents of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), either in Opstina Prijedor or more generally. For that reason, each of the victims of the acts ascribed to the accused in Section III of this Opinion and Judgment enjoy the protection of the prohibitions contained in Common Article 3, applicable as it is to all armed conflicts, rather than the protection of the more specific grave breaches regime applicable to civilians in the hands of a party to an armed conflict of which they are not nationals, which falls under Article 2 of the Statute. Such a conclusion is, of course, without prejudice to the position of those citizens of the Republic of Bosnia and Herzegovina who found themselves in the hands of forces of the JNA before 19 May 1992 or in the hands of forces of the VJ after that date, whether in the territory of the Republic of Bosnia and Herzegovina or elsewhere, or to those citizens of the Republic of Bosnia and Herzegovina in the hands of units of the VRS which, from time to time, may have fallen under the command and control of the VJ and of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro).

Prosecutor v. *Tadic*, Case No. IT-94-I-T, Opinion and Judgment, para. 607 (T.Ch.II May 7, 1997).

<sup>223</sup> The Trial Chamber refers to “the nature of the armed conflict as an ethnic war and the strategic aims of the Republika Srpska to create a purely Serbian State.” Prosecutor v. *Tadic*, Case No. IT-94-I-T, Opinion and Judgment, para. 574 (T.Ch.II May 7, 1997).

The Muslims, Serbs, and Croats of Bosnia and Herzegovina shared a common Yugoslav nationality at the start of the ethnic warfare in 1992. During the past few years, the international community has been attempting, through the Dayton Accords, to reestablish a multiethnic Bosnia and Herzegovina in which local Muslims, Serbs, and Croats share full citizenship rights. But concern for the future unity and territorial integrity of Bosnia and Herzegovina does not require insistence upon the fiction that all Bosnians shared an effective common nationality in 1992. The realities of the situation in Bosnia and Herzegovina were not so simple.

In the spring and summer of 1992, when Dusko Tadic committed the criminal acts for which he was convicted, an armed conflict was raging in Bosnia and Herzegovina. This conflict was one between groups who, while now recognized as Bosnians under international law, did not always, or even generally, treat civilians of differing ethnicity and religion as nationals. The Bosnian Serb leadership, for example, was found by the Trial Chamber to have been engaged in a clear plan of ethnic cleansing against citizens of the other groups present within their territory.<sup>224</sup>

The war placed citizens of Bosnia and Herzegovina in a state of uncertainty that effectively negated their common nationality as Bosnians. Had the conflict in Bosnia and Herzegovina been resolved without the diplomatic intervention that led to the U.S.-brokered Dayton Agreement, and without the multilaterally sanctioned military intervention of IFOR and SFOR troops, it is quite possible that the Serb residents of Republika Srpska would now be nationals of another state.<sup>225</sup>

<sup>224</sup> The Trial Chamber's findings of fact with regard to the acts of the accused in the camps run by Republika Srpska note:

Those acts clearly occurred with the connivance or permission of the authorities running these camps and indicate that such acts were part of an accepted policy towards prisoners in the camps in opstina Prijedor. Indeed, such treatment effected the objective of the Republika Srpska to ethnically cleanse, by means of terror, killings or otherwise, the areas of the Republic of Bosnia and Herzegovina controlled by Bosnian Serb forces.

Prosecutor v. Tadic, Case No. IT-94-I-T, Opinion and Judgment, para. 575 (T.Ch.II May 7, 1997).

<sup>225</sup> It was certainly the objective of Serb leaders in Republika Srpska and elsewhere to create a "Greater Serbia" cleansed of Muslims and Croats. The Trial Chamber found that at the beginning of the conflict in Bosnia and Herzegovina:

[t]he objective of Serbia, the JNA and Serb-dominated political parties, primarily the SDS . . . was to create a Serb-dominated western extension of Serbia, taking in Serb-dominated portions of Croatia and portions, too, of Bosnia and Herzegovina. This would then, together with Serbia, its two autonomous provinces and Montenegro, form a new and smaller Yugoslavia with a substantially Serb population. However, among obstacles in the way were the very large Muslim and Croat populations native to and living in Bosnia and Herzegovina. To deal with that problem the practice of ethnic cleansing was adopted. This was no new concept. As mentioned earlier, it was familiar to the Croat wartime regime and to many Serb writers who had long envisaged the redistribution of populations, by force if necessary, in the course of achieving a Greater Serbia. This concept was espoused by Slobodan Milosevic, with ethnic Serbs widely adopting it throughout the former Yugoslavia, including Serb political leaders in Bosnia and Herzegovina and in Croatia.

Prosecutor v. Tadic, Case No. IT-94-I-T, Opinion and Judgment, para. 84 (T.Ch.II May 7, 1997).

Stretching the legal notion of nationality so far beyond its traditional definition is a controversial proposition. The Appeals Chamber's views concerning the Tribunal's jurisdiction under Article 2 of its Statute indicate a reluctance to adopt radical and dynamic interpretations of existing legal doctrines.<sup>226</sup> The *Tadic* Trial Chamber majority, having already been reversed by the Appeals Chamber for ruling that Article 2 (on grave breaches) could be applied to internal armed conflict, was apparently not inclined to apply an unconventional definition of nationality.

An examination of twentieth century international law and state practice relating to the concept of nationality reveals that in a growing number of situations the narrow traditional notion of nationality has been superseded by more functional distinctions.<sup>227</sup> For example, in 1923, the Permanent Court of International Justice (PCIJ) was faced with a dispute between the United Kingdom and France involving nationality. French government decrees had conferred French nationality and liability for French military service upon all men born in Tunis or Morocco to at least one native parent. The British objected and wanted to submit the matter to the PCIJ. When France would not agree to this, the United Kingdom took the matter to the Council of the League of Nations. The Council in turn requested an advisory opinion from the PCIJ on the question of whether it had the right to discuss and make recommendations on this matter in light of language in the covenant precluding the Council from acting on any matters "solely within the domestic jurisdiction" of a state.<sup>228</sup> The PCIJ held that each state could determine, for its own purposes, whether to treat a particular individual as its national, but that the dispute between these two countries concerning these nationality decrees was not, under international law, solely a matter of domestic jurisdiction such that the Council of the League of Nations could not discuss it and make a recommendation as to settlement.<sup>229</sup> The PCIJ in

<sup>226</sup> See *supra* note 135.

<sup>227</sup> Michael Reiterer has described this trend as follows:

Under traditional international law, which concerned itself mainly with relations between sovereign entities (and recognized them as the sole subjects of international law), nationality was the sole link between the individual (an "object" of international law) and the law itself. The further development of international law, especially with the growing awareness of human rights, has diminished the linkage function of nationality. The appearance of new (at least partly) subjects of international law, i.e., international organizations, NGOs, transnational corporations, and the individual, has fostered the establishment of other links (assignment methods), either by redefining nationality or by employing criteria other than nationality, e.g., effective or genuine or functional links.

Michael Reiterer, Book Review, 81 A.J.I.L. 970 (1987) (reviewing RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW*).

<sup>228</sup> According to the Covenant of the League of Nations:

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendations as to its settlement.

LEAGUE OF NATIONS COVENANT art. 15(8).

<sup>229</sup> See Advisory Opinion No. 4, *Nationality Decrees Issued in Tunis and Morocco Case*, 1923 P.C.I.J. (ser. B) No. 4, at 24.

effect recognized that the nationality of an individual could have international as well as domestic implications.<sup>230</sup>

The *Nottebohm* case, decided by the ICJ in 1955,<sup>231</sup> involved a German national who lived in Guatemala for many years before being summarily naturalized as a citizen of Liechtenstein just before World War II began. A few years after returning to resume his residence in Guatemala, Nottebohm was arrested and deported to the United States as an enemy alien, and his assets in Guatemala were eventually confiscated by that country. Liechtenstein espoused Nottebohm's claim before the ICJ and asked the court to declare Guatemala's actions violative of international law. The court accepted Guatemala's argument that Liechtenstein's claim was inadmissible on the grounds of the claimant's nationality.

More specifically, the ICJ ruled that although as a matter of its domestic law a state might grant nationality to an individual with whom it did not have a "genuine link," such a state was not entitled, as a matter of international law, to extend its diplomatic protection to that individual. The court reasoned that while domestic law determines nationality for domestic law purposes, international law determines whether a state is entitled to exercise diplomatic protection and seize the ICJ. Under international law, nationality must correspond to the factual situation and so must be based on a "genuine link" between the state and the individual granted nationality.

A version of the "genuine link" logic of the *Nottebohm* case should be applied to question the common "Bosnian" nationality of those charged with war crimes and their victims. If the victim and the accused were not truly linked by a common nationality, if they were clearly viewed and treated de facto as being of differing nationalities which correspond to those of parties to the conflict, then that victim should appropriately be considered to have been "in the hands of a Party to the conflict or Occupying Power of which they are not nationals" and therefore a "protected person" under Article 4 of Geneva Convention (IV) of 1949.

Jordan J. Paust has articulated in strong terms the policy argument that a more flexible concept of nationality should apply for purposes of international humanitarian law:

In the context of a belligerency . . . where there are substantial differences in group make-up and one of the groups is striving for self-determination, it is both unrealistic and unresponsive to overall community policy and Geneva goal values to continue to treat the populace of such a belligerent as "nationals" of the other belligerent within the meaning of [A]rticle 4—especially

<sup>230</sup> The PCIJ stated:

[While nationality] is not, in principle, regulated by international law, the right of a state to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other states. In such a case, jurisdiction which, in principle, belongs solely to the state, is limited by rules of international law.

*Id.*

<sup>231</sup> *Nottebohm Case*, (Liech. v. Guat.), 1955 I.C.J. 4, 23–26 (Apr. 6).

when common interpretation of the word "nation" or "nationals" is not equated with "state" but can refer also to a group of people. Formalistic thinking would otherwise withhold the full protection of the Geneva Convention, which was enacted to increase protection for civilians in times of armed conflict, from the same persons who are entitled to the protection of the customary law of war.<sup>232</sup>

Along similar lines, Ruth Wedgwood has proposed that the definition of protected persons found in the Geneva Convention (IV) should take into account the concept of estoppel. She concludes that "[w]here a rump belligerent engages in ethnic cleansing of a region and declares itself to be a separate state banishing residents of another heritage, the belligerent can be estopped from claiming 'co-nationality' so far as Geneva is concerned."<sup>233</sup>

The application of this more pragmatic notion of nationality for purposes of international humanitarian law can be justified as necessary and appropriate, especially in light of the increasingly unclear distinction between internal armed conflict and international armed conflict. This represents the best hope for preserving the relevance of the grave breaches regime in the conditions described above.

Some scholars have challenged the traditional notion that issues of nationality are entirely a matter within the domestic jurisdiction of states,<sup>234</sup> instead arguing that international standards do apply to this important issue.<sup>235</sup> One scholar recently argued that international standards should govern the very right of states to grant or withhold nationality.<sup>236</sup> Other important if less radical changes in the attitude of international law towards nationality can be discerned in the concepts of

<sup>232</sup> Paust, *supra* note 156, at 14–15.

<sup>233</sup> Wedgwood, *supra* note 71, at 273–74.

<sup>234</sup> The landmark treaty relating issues of nationality to international law is the Convention on Certain Questions Relating to the Conflict of Nationality Laws (The Hague, 1930). But even the basic rule of national jurisdiction, as set out in Article 1 of that convention, leaves open the possibility that principles of international law may govern nationality: "It is for each state to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality." L.N. Doc. C. 24 Mar.–Apr. 1930, M. 13. 1931. V., 179 L.N.T.S., 89.

<sup>235</sup> In one of the best of all treatises on this issue, Dr. Paul Weis argues that "the importance of the decision in the Nottebohm Case lies in the fact that the principle of effective link was applied in a case where only one nationality was at issue." P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 180 (2d ed. 1979). He later concludes that "the principle of effective nationality . . . is widely practised and recognised today. . . . [I]t applies not only to cases of plural nationality but to cases of doubtful nationality also." *Id.* at 203.

<sup>236</sup> See Satvinder S. Juss, *Nationality Law, Sovereignty, and the Doctrine of Exclusive Domestic Jurisdiction*, 9 FLA. J. INT'L L. 219, 222–23 (1994). Juss comments:

Nationality has long been a concept in international law. It is high time that it was recognized that as such it is too important, especially in the changing conditions of the modern world, to be left to the mercy of nation States where today, in many cases, nation States themselves are undergoing fundamental change.

*Id.* at 222.

"functional nationality," "de facto nationality,"<sup>237</sup> and "effective nationality," which have gained some currency in modern usage.

There is a clear trend away from the notion that a single simple notion of nationality applies for all purposes in international law. The Iran-U.S. Claims Tribunal, for example, has ruled that although it was established for the purpose of deciding claims of "nationals" of the United States against Iran, the claims of a dual U.S.-Iran national against Iran may fall within its jurisdiction when it appears in light of all relevant factors that the "dominant and effective nationality" of the claimant at the time in question was that of the United States.<sup>238</sup>

Following this trend, the International Tribunal should take a more functional approach to the definition of nationality for purposes of international humanitarian law. Had it done so, it would have found that at least some of the victims of interethnic violence among Bosnian groups were protected persons under the terms of the Geneva Convention (IV). This could be justified on the basis of a finding that the local Bosnian Government, Bosnian Serb or Bosnian Croat authorities, in de facto control, did not consider their victims from other ethnic groups to be nationals of their political entity. A separate justification would lie in the status of Bosnia and Herzegovina as a "failed state" at the time when Tadic's crimes were committed.<sup>239</sup> In such cases the victims could be

<sup>237</sup> Michael Reiterer opines:

Functional nationality . . . [is] a "nationality" acquired by the operation of international law and therefore an exception to the rule that "nationality cannot be bestowed or acquired under international law, only under municipal law" . . . [.] A further example of the influence of international law is the so-called *de facto* nationality, based on the interest of a state in assimilating a non-national to the status of a national in order to enable him to benefit from municipal rights granted to nationals or for the purpose of diplomatic protection in the international sphere.

Reiterer, *supra* note 227, at 973.

<sup>238</sup> See Monroe Leigh, *Judicial Decisions: Decision of the Iran-United States Claims Tribunal*, 78 A.J.I.L. 912, 913 (1984).

<sup>239</sup> The notion of the "failed state" has become increasingly familiar, although it remains controversial. See Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, FOREIGN POL'Y, Winter 1992-93, at 3 (advocating U.N. conservatorship for such states). "The common theme is overwhelmed governments that are almost, if not completely, unable to discharge basic governmental functions." Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 306 (1995). This certainly describes the government of Bosnia and Herzegovina during the period when Tadic committed his crimes. Gordon is wary of this idea, and after asking if "[p]erhaps failed States have failed to the point that they are no longer States, and by inference, no longer Members of the United Nations," *id.* at 332, she concludes that "[g]iven the strong presumption in favor of retaining international personality, and taking into account recognition and the views of the entity concerned, failed States do not appear to have forfeited their status as States." *Id.* at 336. But for a state such as Bosnia-Herzegovina, which in 1992 had recently seceded from the former Yugoslavia and had not yet established the objective control of its territory normally associated with statehood, this presumption should not apply to the same extent as it does for established states which have subsequently failed.

The concept of the "failed state" has been linked to the need for the international community to take humanitarian action where a state cannot act effectively to protect fundamental rights:

The emergence of certain "failed states," incapable of fulfilling their state responsibility and expressing their consent to the establishment of administrative structures and democratic institutions on their behalf, has introduced what may be called a third generation humanitarian intervention. The United Nations' operations in the Congo



said to be “in the hands of a party to the conflict” with whom they did not share the same *effective and functional nationality*.

## 2. *Legislative Alternatives*

It has been recognized since the time of the Nuremberg Tribunal that there are overlapping and redundant ways in which criminal acts can violate international humanitarian law.<sup>240</sup> Judge Georges Abi-Saab, in a separate opinion written while he was a member of the Appeals Chamber, suggested that it was time for the ICTY to impart some order to the chaos of overlapping crimes under international humanitarian law. His opinion notes:

(ONUC), Cambodia (UNTAC) and Somalia (UNOSOM), and the European Union's involvement in Mostar (Bosnia-Herzegovina) belong to this generation of humanitarian intervention.

Yogesh K. Tyagi, *The Concept of Humanitarian Intervention Revisited*, 16 MICH. J. INT'L L. 883, 886 (1995); see also, Brown, *The Protection of Human Rights in Disintegrating States: A New Challenge*, *supra* note 2, at 218–24 (describing U.N. peacekeeping operations in Cambodia, Bosnia, and Iraq).

Henry Richardson has argued that the notion of “failed states” should not be recognized under international law because it is a “state-centric, pejoratively normative label used to defend existing patterns of international dominance by attributing ‘failure’ and giving permission to intervene.” Henry J. Richardson III, *“Failed States,” Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT'L & COMP. L.J. 1, 7–8 (1996). Professor Richardson's focus is upon self-determination as opposed to armed intervention. He argues persuasively that instead of trying to define criteria for determining the “failure” of a state, “[i]t is time for international law to move from its present policy which supports the status quo government regardless of its acts and undergird a ‘preventive diplomacy’ that gives authority to groups’ or peoples’ warranted claims of self-determination as they may arise against national governments.” *Id.* at 10–11. His points do not weigh against the recognition, under international humanitarian law, of the effective and functional nationality of minorities. From the perspective of minority rights this recognition would be more a vindication of the right to self-determination than an act of intervention.

<sup>240</sup> The U.N. War Crimes Commission was quite forthright about this problem:

The comparative novelty of certain parts of the law formulated in the Nuremberg and Far Eastern Charters, and the fact that they represent in themselves a partial and new codification in the field of international penal law which is in the making, give rise to some difficulties in establishing a precise classification of all the various effects of the law developed and codified in the Charters. This is particularly true in regard to the drawing of a clear line between “war crimes” proper on the one hand and “crimes against humanity” on the other, and in establishing in a precise manner the scope of the latter.

This difficulty of drawing a clear line of demarcation between the two categories of crimes was confirmed by the Judgment of the Nuremberg Tribunal. It did not say in what cases and under what conditions or circumstances “crimes against humanity” are at the same time “war crimes” and in what cases they are not. Nevertheless, it established, on the one hand, the fact of the possibility of situations arising where the two categories overlap and intermingle, and on the other hand of situations arising where they remain distinct and separated.

Without entering into the question whether the reason for such a close relationship between the two categories lies in the similar nature of the offenses which they are intended to cover, it is evident that the law is apparently not clear enough to provide a definite line of demarcation.

On the other hand, the fact remains that, however closely intermingled, both categories preserve their individuality both in the text of the law and in the sphere of facts as established by the Nuremberg Judgment, and that they can never reach the point of being entirely absorbed the one by the other.

United Nations War Crimes Comm'n, *History of the United Nations War Crimes Commission and the Development of the Laws of War* 219–20 (1948).

[The ICTY and the International Tribunal for Rwanda] are thus afforded a unique opportunity to assume the responsibility for the further rationalization of these categories [of international crimes under the Statute] at some distance from the historical and psychological conditions from which they emerged and from the perspective of the evolving international legal order.<sup>241</sup>

On this basis Judge Abi-Saab argued:

[A] strong case can be made for the application of Article 2, even when the incriminated act takes place in an internal conflict. . . . This is not a mere question of semantics, but of proper legal classification of this accumulated normative substance, with a view to introducing a modicum of order among the categories of crimes falling within the substantive jurisdiction of the Tribunal.<sup>242</sup>

The majority of the Appeals Chamber took a more conservative view and declined to reinterpret the scope of the grave breaches provisions of the 1949 Geneva Conventions by applying them to internal armed conflicts as well as to international armed conflicts.<sup>243</sup> While suggesting that a progressive development of the law in this direction might indeed be desirable and even inevitable, the majority decided against attempting to achieve this through a quasi-legislative judicial process.<sup>244</sup>

The decisions of the International Tribunal may not be the best means for the recodification and progressive development of international humanitarian law. Nevertheless, some process is needed to restore logical coherence to that entire body of law, and help maintain the relevance of the grave breaches regime to the humanitarian crises of this era. Eventually, this might be accomplished by the negotiation, under the aegis of either the International Red Cross or the United Nations, of a codifying treaty subject to ratification by states. A related process is currently underway at the United Nations as part of the Preparatory Commission Negotiations on a Permanent International Criminal Court,<sup>245</sup> but the principal thrust of those negotiations is toward the

<sup>241</sup> Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeals Decision on Jurisdiction (A.C. Oct. 2, 1995) (separate opinion of Judge Abi-Saab, pt. I, at 2).

<sup>242</sup> *Id.* at 5.

<sup>243</sup> Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeals Decision on Jurisdiction, para. 83 (A.C. Oct. 2, 1995). The Appeals Chamber cited evidence of what it called "the present trend to extend grave breaches provisions to such [internal] category of conflicts." *Id.* para. 84. It then concluded that "in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts." *Id.*

<sup>244</sup> *See id.*

<sup>245</sup> During its 46th session, the International Law Commission developed a draft statute creating such a permanent International Criminal Court in the form of a treaty that could be ratified by states. *See Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, at 29, U.N. Doc. A/49/10 (1994) (Draft Statute for an International Criminal Court) [hereinafter ILC Report]. In December of 1995, the General Assembly decided to create a Preparatory Committee on the Establishment of an International Criminal Court to discuss the issues arising out of the Draft Statute with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court for consideration by a plenipotentiary conference of states. *See G.A. Res. 46*, U.N. GAOR, 50th Sess., Supp. No. 49, at 307, U.N. Doc. A/50/46 (1995) [hereinafter G.A. Res. 46]. These negotiations

creation of a new permanent institution rather than toward a radical re-codification of the applicable law.

## V. CONCLUSION

The body of international humanitarian law applied by the International Tribunal is firmly established as part of positive international law. Nevertheless, when the Tribunal began its work, some crucial issues of law relevant to its task were yet to be resolved. Existing treaties and customary international law are sufficient to define the rights and obligations of states under international humanitarian law, but the application of these same standards to criminal cases requires a modified definition encompassing the rights and obligations of individuals as well. The task of redefinition and adjustment falls for the moment to the judges of the International Criminal Tribunals,<sup>246</sup> and the decisions they have rendered thus far have done much to clarify and develop the applicable law.

Normative fluidity is not a virtue in the field of criminal law. Uncertainty concerning the precise elements of crimes under international humanitarian law raises questions under the well-known principle of *nulum crimen sine lege* as well as under international fair trial standards. But the serious violations of international humanitarian law within the jurisdiction of the Tribunal are of sufficient notoriety that none of those indicted can complain that new laws are being applied to them *ex post facto*. Criminal acts such as murder, torture, and rape are universally condemned, and these acts form the material basis of most of the charges in the Tribunal's indictments.

The judgment of the ICTY Trial Chamber in the *Tadic* case demonstrates that it can successfully try and convict individuals for crimes based on international humanitarian law. But that judgment erroneously concludes that the grave breaches provisions of the Geneva Conventions of 1949 do not apply to crimes against civilians committed as part of the interethnic conflict within Bosnia and Herzegovina. The implications of this conclusion are profound because, unlike the crimes for which Tadic was convicted, these grave breaches are subject to a special multilateral regime of enforcement.

Under the present state of the law, acts against civilians can be characterized as grave breaches only if the acts were committed in the context of an international armed conflict, and if the civilians concerned were in the hands of a party to the conflict whose nationality differed from theirs. The Tribunal's Trial Chamber was itself divided on how these elements should be construed and applied to the facts in the *Tadic*

are ongoing, and a Plenipotentiary Conference to adopt the agreed text is anticipated in June of 1998. See Barbara Crossette, *Legal Experts Agree on an Outline for a Global Criminal Court*, N.Y. TIMES, Dec. 14, 1997, at A23.

<sup>246</sup> Even as they decide the cases presently before them, similar legal issues are being raised in the continuing political negotiations concerning the possible creation of a permanent International Criminal Court. See ILC Report, *supra* note 245, at 29; G.A. Res. 46, *supra* note 245, at 307.

case. The majority applied a simple chronological test to determine that the formal withdrawal of the Yugoslav Army from Bosnia and Herzegovina on May 19, 1992, transformed the continuing armed conflict among Serbs, Muslims, and Croats into a purely internal affair. While all the judges conceded that the principle of agency could apply in determining the nationality of the parties to the conflict and the internationality of the armed conflict, they could not agree on the test for the principle's application. The "effective control" test the majority applied was so strict that it could not be met even by ample proof of the essential financial, logistical, and other support provided by Yugoslavia (Serbia and Montenegro) to the Bosnian Serb army—an army that it had created and left behind to complete its task of promoting Serbian domination in Bosnia and Herzegovina. Thus Tadic, the Bosnian Serb Army he supported, and the Bosnian Muslim and Bosnian Croat victims he persecuted only one month after that formal withdrawal, were all held to share a common Bosnian nationality. As a result, the grave breaches regime was declared inapplicable to the serious violations for which Tadic was nonetheless convicted. This strict and formalistic application of the criteria for nationality severely undermines the effectiveness of international humanitarian law. It also defies common sense.

Formal and traditional notions of nationality should not be allowed to govern the application of international humanitarian law in situations where the state has disintegrated, or where it has not yet congealed into a viable form capable of creating an effective nationality for its citizens. Concerns that the application of the grave breaches regime would undermine the sovereignty of the state are misplaced where the state concerned was in a failed status, as was Bosnia when Tadic committed his crimes in 1992. This is particularly true when the state involved has not yet congealed into a viable form capable of creating an effective nationality for its citizens.

Refusing to apply the grave breaches provisions to interethnic warfare in Bosnia and Herzegovina serves no legitimate state or other interest. The government most directly concerned, that of Bosnia and Herzegovina, has not opposed the prosecution of Bosnian nationals for acts of violence against other Bosnian nationals, nor has it objected to the legal characterization of those acts as grave breaches. In fact, it has cooperated with the ICTY in apprehending and delivering for trial Bosnian nationals who have been indicted by the Tribunal, and has arrested those present in its territory under its direct control.

In spite of the concerns expressed above about the weak application of the grave breaches regime, the overall record of the ICTY has been very positive. By building upon the varied national approaches that satisfy internationally recognized fair trial standards,<sup>247</sup> the International Tribunal has been successful both in developing a set of rules of

<sup>247</sup> See ICCPR, *supra* note 50, art. 14; ICTY Statute, *supra* note 1, art. 21.

evidence and procedure that incorporate international standards, and in implementing them fairly in practice.

The implementation of international fair trial standards requires the identification of specific elements of the crimes charged, even though the specifics of these elements have rarely been discussed by any international body in the past. The International Tribunal cannot avoid being specific about these matters, and the opinion and judgment in the *Tadic* case demonstrates that the judges appreciate the importance of this issue. The Tribunal has taken great care, for example, to develop and apply a clear criterion for distinguishing between serious violations of international humanitarian law and domestic crimes that are not properly the concern of an international criminal tribunal.<sup>248</sup> The continued success of the existing ad hoc tribunals in melding international humanitarian law, international human rights standards, and the experience of various national criminal law systems into an internationally recognized criminal code will provide a model for future permanent institutions such as the proposed International Criminal Court.

<sup>248</sup> Prosecutor v. Tadic, Case No. IT-94-I-T, Opinion and Judgment, para. 572 (T.Ch.II May 7, 1997); see also note 122 and the accompanying quotation.